

## **Restorative Justice: Rethinking Justice in a Postcolonial World**

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## **Introduction**

The discourse of restorative justice has come to considerable prominence in recent years, emerging in diverse political and social contexts. From peacebuilding efforts in Africa and Latin America to movements for criminal justice reform around the world, restorative justice has surfaced as a plausible alternative to conventional criminal justice, introducing innovative practices and challenging common understandings about crime and justice. This paper will explore this phenomenon by examining three contexts in which the discourse of restorative justice has gained notable influence: (1) the restorative justice movement in criminology and criminal justice; (2) restorative justice in the project of peacebuilding; (3) Aboriginal justice and alternative sentencing in Canada. These cases are distinguished not by geography, political boundaries or academic discipline, but by the problem restorative justice is put forth as addressing in each instance. This is a largely analytical distinction, as there is significant cross-fertilization between these three cases, designed to facilitate reflection on the meaning of restorative justice, its normative significance and the importance of context to both of these objectives.

I argue that despite the plurality of contexts in which the discourse of restorative justice has materialized and the strong differences between them, the usage of restorative justice language in each case reflects a limited but significant convergence around a common core of principles and concerns.

## **Victims, Offenders and Community: A Push for Criminal Justice Reform**

As an ideal, a set of principles or a guide for public policy, processes and outcomes, restorative justice has emerged as a sizeable influence in criminology and criminal justice over the past two decades, provoking vibrant academic debate and generating a multitude of practical

initiatives in countries around the world. This is due in part to a growing perception that modern criminal justice has been largely unsuccessful at achieving its stated goals of deterrence and crime prevention, and at providing “victims and offenders with a satisfactory experience of justice” (Johnstone, 2002, p. ix). Indeed, the needs of victims are often neglected in the justice process, it is suggested, because its focus – in the courtroom and afterwards – rests constantly on the offender: on establishing guilt, ensuring accountability and delivering suitable punishment, while sending a clear message to other potential wrongdoers that delinquent behaviour will not be tolerated (Bazemore and Umbreit, 1995; Zehr, 1990). Both victims and offenders have little more than a passive role to play at trial, where their futures are negotiated by professionals under highly routinized, adversarial conditions (Strang, 2002; Van Ness and Strong, 1997; Wright, 1991). Receiving little material or psychological support, victims become largely alienated from the judicial process, critics suggest, while offenders are discouraged from actively taking responsibility for their actions, addressing their guilt or making amends and instead learn new survival skills appropriate to the dehumanising environment of a prison (Zehr, 1990).

Advocates of restorative justice attribute these failures of criminal justice to the particular set of understandings, assumptions and beliefs about the nature of crime and justice underlying its institutions and procedures – the paradigm or lens through which the problem of crime is perceived and its solution determined (Bazemore, 1996; Zehr, 1990). Criminal justice is typically viewed through a retributive lens<sup>1</sup>: crime is seen as an offence against the state, as lawbreaking, for which punishment is an appropriate and necessary response, while the needs of victims and the broader community are incidental to the fulfilment of offenders’ just deserts (Bazemore, 1996; Bazemore and Umbreit, 1995; Zehr, 1990). The restorative justice paradigm, in contrast, focuses on the harm caused by the criminal act – harm which may extend beyond the

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<sup>1</sup> This image is Howard Zehr’s (1990).

primary victims to the larger community, and even to the offender (Van Ness, 1993). Doing justice means finding ways to repair that harm, through a process that brings together “all the parties with a stake in a particular offence... to resolve collectively how to deal with the aftermath of the offence and its implications for the future.” (Marshall, quoted in Van Ness et al., 2001, p. 5). Daniel Van Ness describes the purpose of restorative justice as “the restoration into safe communities of victims and offenders who have resolved their conflicts.” (1993, p. 258). Restorative justice thus places strong emphasis on dialogue, on bringing together those affected by a criminal act to discuss the event and how it has affected them and to negotiate steps the offender might take to make amends to the victims (through some sort of compensation or community service) and contribute to healing and reconciliation within the community.

This restorative vision of crime and justice, as advocates are quick to point out, can be traced far back to the earliest civilizations and was only abandoned in Europe around the 12<sup>th</sup> Century, as royal jurisdiction was asserted over the worst crimes, and punitive measures overtook forms of compensatory justice as legitimate responses to violations of state law (Van Ness and Strong, 1997; Weitekamp, 1999; Wright, 1991). The restorative justice *movement* in its current incarnation within academic and activist circles, emerged in the mid-1970s out of an array of predecessor movements. Van Ness and Strong (1997) list the informal justice, restitution, victims’, reconciliation and conferencing, and social justice movements as main sources, while Bazemore and Walgrave (1999) attribute sizeable influence to the women’s movement and indigenous political movements, in writing about restorative approaches to juvenile justice. In spite of the diverse origins of the restorative justice movement – or perhaps due to the convergence of a plurality of perspectives – certain key themes emerge as central to

the discourse of restorative justice. These themes receive varying degrees of emphasis within the literature, but are prominent throughout.

First, restorative justice rejects the perception of crime as a violation of state law and instead understands crime to be “a violation of people and relationships” (Zehr, 1990, p. 181). Its concern is not with the act of lawbreaking, but with the injuries caused by criminal behaviour, the negative consequences of the criminal act. Doing justice requires that we repair this harm,

which includes material damage, psychological and other forms of suffering inflicted on the victim and his proximate environment, but also social unrest and indignation in the community, uncertainty about legal order and the authorities’ capacity for assuring public safety. It also encompasses social damage which the offender caused to himself by his offence. (Walgrave, 2003, p. 61)

Thus, restorative justice diverts our attention from the inherent criminality or wrongness of the act itself to addressing the harmful consequences of that act – consequences which extend beyond the primary victim(s) to the larger community, and to the offender as well (Bazemore and Walgrave, 1999; Johnstone, 2002; Van Ness, 1993; Van Ness and Strong, 1997; Walgrave, 2003; Wright, 2004).<sup>2</sup> The objective of restorative processes – for example, conferencing, mediation, sentencing circles – is to facilitate healing and repair for all affected parties, keeping in mind that their experience of the crime, their injuries and needs, will be different depending on their relationship to the incident.

Second, restorative justice shifts the focus of criminal justice away from punishing offenders to rebuilding or restoring damaged relationships. This means encouraging offenders to make amends to their victims, to take active responsibility for their crimes by apologizing and/or offering them some sort of compensation for their losses. Thus, restorative justice is thought to foster greater accountability for offenders by pushing them to own up to their crimes and take

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<sup>2</sup> The debate over the definition and limits of “community” is significant. For a brief summary of the issue see Mara Schiff (2003), p. 329. See also Bazemore and Schiff (2001).

responsibility for the consequences of their actions (Van Ness et al., 2001; Van Ness and Strong, 1997; Zehr, 1990). Victims, for their part, are invited to face their victimizers, to tell their story and describe how the crime has affected them (Strang, 2002; Wright, 2004). Carefully implemented, restorative justice processes are thought to further reconciliation between victim and offender and healing of the affected community.

Third, restorative justice encourages the active involvement of all affected parties in the justice process. Victims and offenders are brought together in an informal setting to discuss the effects of the crime and to negotiate possible reparative measures. Restorative justice thus empowers victims and encourages offenders to actively demonstrate responsibility for their actions:

For victims who have experienced powerlessness, the opportunity to participate restores an element of control. For an offender who has harmed another, the voluntary assumption of responsibility is an important step in not only helping others who were hurt by the crime but also in building a prosocial value system. (Van Ness and Strong, 1997, p. 35).

The ultimate goal is a strengthened, peaceful community in which everyone can live safely (Van Ness et al., 2001).

While most restorative justice advocates in the areas of victimology, criminology and criminal justice express support for these principles in one form or another, many areas of debate and disagreement persist in this ever-expanding field of inquiry. As a proposal for criminal justice reform, restorative justice has been subject to a variety of questions about implementation and outcomes, and although much research has already been carried out on the effects of restorative mechanisms on participants, concerns still remain about the connection between philosophy and practice and the feasibility of restorative ideals. I will not attempt to outline all

of these issues here; however, I think it worthwhile to mention some of the broad areas of theoretical debate in which discussion is ongoing.

*Punishment, retribution and restoration.* A first area of disagreement concerns the place of punishment within a restorative model of criminal justice. While some see punitive measures as antithetical to the restorative purpose, situating opposition to punishment among the core restorative justice commitments, others see an essential role for punitive sanctions within the restorative justice framework. Punishment is painful – on this point all would seem to agree. The hard treatment and stigma associated with punitive measures are intended to communicate to the recipient society's disapproval of their behaviour and to send a warning message to others who would take the same course. On a retributive understanding, punishment is crucially about desert; one who commits a wrong *deserves* harsh treatment proportional to the damage done and to the nature of the wrong perpetrated. For Lode Walgrave (2003), there is a fundamental incoherence to the idea of punishment as a means to restoration. So long as punishment fails to communicate the appropriate message to those most directly related to a crime – the victim and the offender – as Walgrave suggests it does, this already ethically dubious “deliberate infliction of pain” becomes even less justifiable (p. 66). John Braithwaite, in keeping with his republican theory of justice, which sees the pursuit of non-domination as central to human well-being, rejects punishment as a component of restorative justice because he considers it to be inherently disrespectful (Braithwaite, 2003). For Braithwaite, non-punitiveness constitutes a central value of restorative justice; restorative processes are designed to help people become less punitive. Other restorative justice advocates are much more accommodating to punitive measures, envisioning an important role for punishment within a restorative justice framework. Antony Duff (2003), for example, argues that offenders must bear burdens in order that the wrongfulness

of their actions might be communicated both to themselves and to the wider public. These burdens, however, need not be as painful as some make out; remorse, censure and reparations are sufferings that contribute to restoration and fulfil the offender's debt to the community, without inflicting undue pain. Kathleen Daly (2000) likewise rejects the retributive-restorative justice dichotomy, suggesting that while we may need to rethink the kinds of punishments that are appropriate to restorative goals and outcomes, sanctions do have a key role to play in restorative justice.

*Public wrongs and private harms.* An important component of Duff's argument for the incorporation of punishment into restorative justice relates to the public nature of the crimes committed and the kind of harm in need of redress. While the central focus of restorative justice is the repair of harms caused by crime, these harms are distinct from harms that are the result of nature or simple bad luck, he says, in that they consist in *wrongful injury*; that is, they are infringements on a public morality, violating "the values by which the political community defines itself as a law-governed polity" (2003, p. 47). It is in this sense that the harm committed against the victim extends to a broader public and that a responsibility for determining an appropriate response also falls to that community. It is the public nature of the harms committed, their wrongfulness, that requires a punitive response: "Crimes as public wrongs require a public apology: an apology [what he refers to as secular penance] addressed to the whole community as well as to the individual victim." (p. 53). Walgrave, for his part, rejects this distinction outright, taking a stricter consequentialist line (2003). Bringing together those affected by the criminal act, restoring or mending a wounded community, remains at all times ethically primary and must be pursued in keeping with the values of respect, solidarity and responsibility, values that he finds to be lacking in a retributive paradigm.



*Negotiation vs. imposition: bottom-up or top-down approaches to restorative justice.*

Another important set of questions arises out of the practical problem of an offender who resists restorative methods and refuses to own up to their behaviour and accept responsibility for their actions. Can restorative justice be imposed? Can justice truly be restorative in nature and outcome if it involves coercion? This is precisely the question Annalise Acorn raises in her book *Compulsory Compassion: A Critique of Restorative Justice* (2004), in which she criticizes restorative justice for its valiant, but ultimately futile attempt at reconciling justice and an ethic of love, accountability and compassion. One of the reasons for this failure, according to Acorn, is restorative justice's reliance on the goodwill and authenticity of the offender who enters into the restorative process for the outcome of healing, reconciliation and repair for all parties to be achieved. She questions whether the compassion, empathy and forgiveness she identifies as central to the process and outcome of restoration can be compelled.

Procedurally-speaking, however, most restorative justice proponents emphasize *negotiation* and joint deliberation as key features of their model: solutions to the problem of crime should not be imposed from the top, in a faulty attempt at treating people equally, blindly; rather, they must be tailored to meet the needs of those most directly affected – the victim, the offender and their immediate community. It is only through a process of discussion and negotiation that means of putting right the wrongs committed, of repairing those harms *as experienced by* the victim and the offender who are able to share their stories, can be identified and accepted by all parties involved. The issue of bottom-up or top-down approaches to restorative justice remains a source of some dispute, however. While restorative justice advocates tend to agree that limits need to be placed on the kinds of sanctions that can be imposed (by a court or through a restorative justice process) for particular crimes (See Von

Hirsch et al., 2003), avoiding punishments or sanctions that are humiliating or unreasonably burdensome, disagreement persists as to how firm those limits should be and on what grounds they should be maintained.<sup>3</sup> Walgrave, for example, seems to prefer a more bottom-up approach, stating that “[t]he priority for the quality of social life, as expressed in the communitarian utopia, grounds the ‘bottom-up’ approach in restorative justice, which appears through the preference for informal regulations, away from imposed procedures and outcomes.” (2003). Braithwaite, for his part, defends a more mixed approach, endorsing broad limits grounded in the UN human rights accords and informed by empirical research on what victims and offenders say they are looking for in a restorative process, but leaving room for further clarification of these value-structures and local additions derived through what he calls “reflexive praxis”, where the initial values of restorative justice are reflected upon and revised as they are put into practice (2003).

*The reach of restorative justice.* Finally, important questions remain about the reach of restorative justice. Is restorative justice strictly a theory of criminal justice or is it something more? Most of the literature reviewed above restricts its discussion to the fields of criminal and juvenile justice. While cases are considered from around the world, in different contexts, the problem guiding the discussions tends to be limited to one of reforming the criminal justice system. Notable exceptions are Braithwaite and Walgrave, both of whom envision a broader scope for restorative justice values and principles. For Braithwaite,

Restorative justice is about struggling against injustice in the most restorative way we can manage... it targets injustice reduction... It aspires to offer practical guidance on how we can lead the good life as democratic citizens by struggling against injustice. It says we must conduct that struggle while seeking to dissuade hasty resort to punitive rectification or other forms of stigmatising response. (2003, p. 1).

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<sup>3</sup> Consider the continuing debate between John Braithwaite and Philip Pettit, on the one hand, and Andrew von Hirsch and Andrew Ashworth, on the other. For a brief description of the dispute, see Braithwaite (2003), pp. 2-3.

Thus, the principles of restorative justice are taken as guides for how we should interact in all areas of our lives – in the family, in the workplace, in political engagement. Braithwaite’s holistic view of societal change aspires to a new socialization, where citizens engage with one another in non-punitive ways, under conditions of respect and non-domination. Walgrave (2003), for his part, also moves beyond the immediate project of criminal justice reform to derive from restorative principles a broader communitarian ethic, emphasizing attitudes of respect, solidarity and taking responsibility. For Walgrave, then, restorative justice is “far more than a technical perspective on doing justice. It is an ideal of justice in a utopian ideal of society.” (p. 69). In short, while restorative justice in criminology and criminal justice finds its roots in a limited project of criminal justice reform, stirrings of a broader movement for societal change are beginning to be heard.

### **Transcending the Justice-Peace Dichotomy: Restorative Justice in Peacebuilding**

“The challenge of ‘transitional justice’,” according to David Crocker, “is how incomplete and fledgling democracies... should respond (or should have responded) to past evils, without undermining [their] new democratic regime or jeopardizing [their] prospects for equitable and long-term development.” (2003, p. 39). The core of the problem lies in the dual burdens placed on a state and society in transition: on the one hand, a need to face up to past wrongs, to acknowledge evils that occurred under the previous regime and bring those responsible to justice; on the other, an imperative to move on, to look to the future, with a view to establishing peaceful, equitable conditions of coexistence for generations to come. The tension, here, is found in the backward- and forward-looking natures of these competing demands; for, as is often suggested, there is a sense in which the very idea of moving on requires a kind of forgetting, that the successful construction of new, just institutions depends on making a clean break with the

past, while, at the same time, justice demands uncovering the truth, identifying the perpetrators of injustice and holding them accountable. How can a state in transition meet both of these sets of obligations, namely, bring the perpetrators of past atrocities to justice, while ensuring a peaceful, equitable future for the survivors?

This dilemma is commonly portrayed as a strong dichotomy between justice and peace, where focusing on the one means necessarily sacrificing some essential element of the other (Biggar, 2003; Crocker, 2003).<sup>4</sup> Justice is here understood in retributive terms, as requiring that perpetrators of mass atrocities be brought to account in a court of law and punished for their crimes. Tempering the all too human desire for vengeance that is often triggered in the wake of gross violations of human rights, retributive justice is thought to restore a measure of equality between victims and offenders, through the intervention of a third party (the court), which denounces wrongdoers for their crimes and punishes them accordingly, in keeping with commitments to proportionality and individual rights (Minow, 1998). Justice thus conceived is best fulfilled through criminal prosecution; however, Nuremberg-type trials are not always possible, depending on the nature of the conflict and the circumstances under which it was brought to an end. It may be that the risks posed by such measures to an already unsteady peace would be too great, where the perpetrators still hold considerable economic, political or social power and renewed violence remains a strong possibility. A commitment not to hold trials or to limit criminal prosecution may have been a negotiated condition of the transition itself (Kiss, 2002). Or the injustices under consideration may have been “so widespread and systematic...

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<sup>4</sup> See, for example, Chandra Lekha Sriram (2004): while Sriram recognizes the diversity of options available for policymakers in dealing with the past, moving beyond a firm *either/or* conception of the justice-peace dichotomy, her analysis maintains and further consolidates a strict retributive understanding of the requirements of justice and underscores the tradeoffs that an emphasis on one pole over the other (with this conception of justice in mind) necessarily entails. Different peacebuilding mechanisms may be *more or less* just and *more or less* conducive to peace, but can never be entirely favourable to both.

[that] it is not practical to prosecute individuals for the crimes.” (Gutmann and Thompson, 2000, p. 26). These practical considerations place strong limitations on the feasibility of trials as a mechanism for addressing past injustice. Where criminal prosecution is a viable option, questions might still be raised about the depth of the justice carried out. Crocker poses some of the most pressing as he describes the choices that transitional democracies face when assessing different mechanisms for coming to terms with their pasts (2003): Who should be prosecuted? Should those who made the decisions be treated any differently from those who carried them out? For which crimes should offenders be held to account? Can groups be held responsible for violations of human rights? Finally, doubts are raised as to whether trials can accomplish all that is needed to rectify past wrongs; as Priscilla Hayner observes,

The concrete needs of victims and communities that were damaged by the violence will not be addressed through such prosecutions, except of course in providing some solace if the perpetrators are successfully prosecuted. The institutional or societal conditions that allowed the massive abuses to take place – the structures of the armed forces, the judiciary, or the laws that should constrain the actions of officials, for example – may remain unchanged even as a more democratic and less abusive government comes into place. (2002, p. 11).

In short, while trials may seem on first reflection to best fulfil the requirements of justice in dealing with past wrongs, there are a variety of practical and moral considerations that must be taken into account in evaluating the feasibility and desirability of this option.

In light of the difficulties associated with carrying out criminal prosecution of offenders, some states – post-war Germany and Japan being the most prominent examples – have chosen to shut out the past entirely, through a practice of deliberate forgetting or formal amnesia. Heribert Adam and Kanya Adam point to two reasons why this option might be compelling (2001). First, it may not be possible for a state to undergo economic and bureaucratic reconstruction without the skills and expertise of former collaborators. Where a strong majority of the former economic

and political elite was implicated in the atrocities committed under the previous regime, it may be extremely difficult, if not impossible to find the requisite knowledge and experience among non-colluders or victims – particularly where this portion of the population was barred from political participation. Second, the psychological toll on a nation forced to reckon with a guilty past may be too much to bear: “A fragile collective identity [has] to protect itself against an unbearable truth by repressing and rationalising it.” (Adam and Adam, 2001, p. 34). Yet, while such a course of action may respond to legitimate pragmatic concerns about the well-being of a people and its future development, there are strong moral reasons to question the appropriateness of a policy of forgetting the past in the aftermath of grievous political wrongs. For victims, it is likely impossible to forget; reminders of the past are everywhere in the social and political landscape and victims are often haunted by memories of the harms inflicted upon them for the rest of their lives. To ask them to relegate these memories to the past, to let bygones be bygones for the good of the nation, would be to do them further injustice, denying them the recognition and care to which they are entitled. Some, like Nigel Biggar, argue that government has a basic political duty to attend to the injuries of victims and that, furthermore, ignoring victims’ needs in the present will likely lead to renewed confrontation in the future, as wounds are left to fester without treatment (2003).

So, there are important political and moral reasons both to support and question criminal prosecution and forgetting as state responses to past wrongs, where the former, roughly speaking, places justice first and the latter gives primacy to future peace and development. This would seem to indicate that there are problems with conceiving of the decisions involved in peacebuilding as a strict choice between justice and peace (Sriram, 2004). A more nuanced understanding of the stakes of the debate, one that is responsive to political circumstances and

competing moral considerations, is required. The spectrum of possible solutions to the problem of transitional justice is now widely acknowledged to be considerably broad, ranging from truth commissions to reparations, amnesty to lustration – filling in the space of options between trials and amnesia. In recent years, these various alternatives have been selected and combined in innovative ways, prompting a great deal of debate and discussion over their political and practical merits and their ability to meet the requirements of justice.

Perhaps the most controversial and inventive of such initiatives was the South African Truth and Reconciliation Commission, whose final report, issued in 1998, has met with the full gamut of responses, from profound anger to intense praise. The TRC was not the first of such “official bodies set up to investigate and report on a pattern of past human rights abuses” (Hayner, 2002, p. 5), preceded as it was by truth commissions in Uganda, Bolivia, Argentina, Uruguay, Zimbabwe, Nepal, Chile, Chad, Germany, El Salvador, Sri Lanka, Haiti, and Burundi – the first of which had taken place more than two decades earlier.<sup>5</sup> It was, however, the first such commission to offer amnesty to perpetrators on the condition that they make full, public disclosure of their involvement in political crimes (Hayner, 2002).<sup>6</sup> This highly contentious element of the TRC’s mandate received harsh criticism from those concerned that justice was being sacrificed to politics, that perpetrators who had committed the worst possible crimes were effectively getting off “scot-free” (Kiss, 2002, p. 68). Indeed, judgements of political necessity do feature centrally in the commissioners’ defence of the amnesty provision. As Desmond Tutu writes in his foreword to the TRC Report, Nuremberg-type trials were not seen as a viable

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<sup>5</sup> See Hayner’s chart of twenty-one truth commissions in Appendix 1 of her book *Unspeakable Truths* (2002).

<sup>6</sup> Section 3(b) of the *Promotion of National Unity and Reconciliation Act of 1995* states that one of the objectives of the commission shall be “facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act” (South Africa, 1995).

option for South Africa, where the conflict between liberation movements and the state had ended in stalemate rather than defeat (1999, vol. 1, p. 5). Deputy Chairperson, Alex Boraine, affirms that the TRC was more about democratisation than punishment and restitution; he suggests that a commitment to uncovering the truth was a morally appropriate “third way” between trials and blanket amnesty, where resistance to both options was strong:

Essentially, the TRC was committed to the development of a human rights culture and a respect for the rule of law in South Africa. In this sense, the commission was not so much about the past as it was about coming to terms with contemporary challenges and future goals. It is, however, impossible to cope with the present, invaded as it is by the dark shadows of the past, and it is impossible to plan with any certainty for the future without jettisoning some of the baggage from the past that threatens to overwhelm and paralyze every effort. In attempting to build for the future there is an irreducible minimum, and that is a commitment to truth. (2002, pp. 150-151).

Thus, Boraine upholds the view of the TRC as the best possible compromise in light of the political constraints under which the transition was negotiated.

It is a different sort of justification, however, that reveals the deeper logic of the TRC and the novelty of its approach to political transition. This second line of defence acknowledges many of the pragmatic concerns cited above, but sees them from a different perspective, not as limitations on our ability to carry out justice, but as reflections of the complexity of demands justice places on us. While the TRC may have failed to provide full *retributive justice*, argues Tutu, it heeded the call of “another kind of justice – a *restorative justice* which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships – with healing, harmony and reconciliation.” (Tutu, 1999, vol. 1, p. 9, emphasis mine). In a presentation remarkably similar to what we saw in our discussion of restorative justice in criminology, the TRC Report defines restorative justice as a process – as opposed to a goal or an endpoint – which:



- a. seeks to redefine crime: it shifts the primary focus of crime from the breaking of laws or offences against a faceless state to a perception of crime as violations against human beings, as injury or wrong done to another person;
- b. is based on reparation: it aims at the healing and the restoration of all concerned – of victims in the first place, but also of offenders, their families and the larger community;
- c. encourages victims, offenders and the community to be directly involved in resolving conflict, with the state and legal professionals acting as facilitators;
- d. supports a criminal justice system that aims at offender accountability, full participation of both the victims and offenders and making good or putting right what is wrong. (South Africa, 1999, vol. 1, p. 126).

Restorative justice thus collapses the justice-peace dichotomy referred to earlier, by encompassing elements of both sides of the debate, and much of the area in between. While retribution (not vengeance) may contribute to the doing of considerable justice, restorative justice suggests that this is only part of the picture: “Rather than providing an alternative to the goals of the established justice system, restorative justice seeks to recover certain neglected dimensions that make for a more complete understanding of justice.” (Villa-Vicencio, 2000, p. 69). Justice, on this view, is accomplished not by punishing perpetrators for their crimes – although this may achieve some portion of justice – but by restoring to victims the human and civil dignity they have lost, in a spirit of *ubuntu* or humaneness. The TRC sought to achieve this by focusing on the specific needs of victims: a need for public acknowledgement of what had happened to them, a need to see perpetrators held accountable for their crimes, a need for healing and reconciliation.<sup>7</sup>

### **Aboriginal Rights and Alternative Sentencing: Countering a Colonial Legacy**

A third context in which the discourse of restorative justice has emerged relates to efforts to improve the plight of Aboriginal peoples, most notably in Canada, Australia and New

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<sup>7</sup> While there is a great richness to the concepts and arguments evoked in the TRC Report that merits a much more nuanced and detailed discussion, unfortunately I cannot delve into this here as it is beyond the immediate scope of this paper.

Zealand. (My focus in this section will be restricted to the Canadian case.) As in the criminology case, restorative justice here was born out of a critique of the existing criminal justice process and shares many of the elements we saw earlier. There are, however, some unique dimensions to the Aboriginal case that suggest that it should not be dissolved into broader discussions of juvenile and criminal justice reform and that it requires further study in its own right. This short discussion will lay out some key components of the Aboriginal critique of Canadian criminal justice<sup>8</sup> and discuss how recent developments in alternative sentencing practices are thought to address these concerns.

The over-representation of Aboriginal people in Canadian prisons has been a blight on the record of the criminal justice system for many decades. In 1992-1993, Aboriginal offenders comprised 11.9% of the male and 16.7% of the female offender population in Canada. Aboriginal people accounted for 12% of the federal offender population in Canada (including those serving their sentences in the community) in 1997, where only 3% of the Canadian population are Aboriginal. The comparative rate of incarceration of Aboriginal and non-Aboriginal offenders in that same year was 73% to 61%, where only 21% of the Aboriginal population were on some form of conditional release compared to 31% of non-Aboriginal offenders (Canadian Criminal Justice Association, 2000). Studies cite differential treatment by the criminal justice system, socio-economic marginality leading to proportionally higher crime rates, and different offence patterns as explanations for these discrepancies (LaPrairie, 1995). Catharine Crow (1995) emphasizes institutionalised racism (evidenced in the apprehension, conviction and sentencing stages of the criminal justice process) and conflicting cultural values

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<sup>8</sup> Recognizing the great diversity of Aboriginal cultures in Canada and elsewhere, I do not mean to suggest that there is a single “Aboriginal perspective” or to essentialize Aboriginal culture in any way. My purpose here is merely to emphasize the common lines of critique that have emerged in Aboriginal discussions of modern criminal justice in Canada and to suggest that there is something particular about the experiences out of which these concerns have developed that merits further investigation.

as central causes. Explanations aside, these statistics indicate deep problems with the Canadian criminal justice process with respect to its treatment of Aboriginal Canadians, problems that must be addressed if the principles of fairness and equality on which the system is allegedly constructed are to become actuality.

In a year-long study of justice in Canadian Aboriginal communities, Ross Gordon Green asked members of these communities about their experiences with the criminal justice system (1998). His interviews revealed a widespread sense of estrangement between local community members and the criminal justice system. This is due in part to the logistics of the circuit court, which he describes as an “absentee justice system” (Green, 1998, pp. 38-42): most Aboriginal communities located in rural areas are served by courts based in urban centres a considerable distance away; court parties visit periodically, going through the backlog of cases as quickly as possible before leaving once again. The members of the court thus have little knowledge of the workings of these small communities and those they serve feel little connection with the proceedings. Justice is literally imposed from outside, rather than being a reflection of the community’s own judgement, furthering the sense of alienation experienced by members of Aboriginal communities (Williams, 2002, p. 487). In the courtroom encounter, miscommunication and the drawing of false conclusions are a recurring problem, as judges unfamiliar with certain norms of conduct – avoiding eye contact as a sign of respect, lack of verbal participation and overt displays of emotion when under stress, for example – misinterpret the behaviour of defendants to the disadvantage of the latter (Green, 1998; Williams, 2002). Language also poses a significant obstacle the obtention of accurate information about the offender and the crime, often leading to inappropriate sentences (Green, 1998, pp. 42-44).

In short, evidence suggests that Aboriginal experiences with the Canadian criminal justice system differ greatly from those of non-Aboriginal Canadians, where members of Aboriginal communities feel alienated from a system that is largely imposed on them from outside. Many suggest, however, that there is more to this sense of estrangement than problems of implementation. The differential experiences of Aboriginal and non-Aboriginal Canadians in their encounter with the criminal justice system are a reflection of competing value structures and understandings about the nature of wrongdoing and how it should be dealt with (Blue and Rogers Blue, 2001; Crow, 1995; Green, 1998). Here, many of the criticisms and principles laid out in the first section are again mirrored. Where the Euro-Canadian approach to justice is largely retributive and adversarial, Aboriginal justice is mainly conciliatory, focusing on healing and reconciliation (between victim, offender and community) rather than punishment (although punishment may be used when necessary). Justice in Aboriginal communities relies strongly on private mediation within and between families, under the guidance of elders, where compensation is frequently made to those who have been harmed. Adopting a holistic approach, Aboriginal justice focuses on restoring balance and harmony to the affected community.

Furthermore, spirituality features centrally in Aboriginal concepts of justice in a way that is foreign to a Euro-Canadian model of criminal justice – and perhaps distinguishes it from other forms of restorative justice (Williams, 2002). As Arthur Blue and Meredith Rogers Blue explain (Blue and Rogers Blue, 2001), when an individual engages in anti-social behaviour, this is symptomatic of a deeper identity crisis. That individual has lost touch with their community and their culture and in order to heal they must become reacquainted with their family, ancestors and history. A First Nations' elder explains:

Part of that healing, the very beginning of that healing is to know who I am. The only way to know who I am is to know where I come from, so I got to learn that

culture, what ever it is that I have, that culture that I was born into. I have to learn that and learn the history of that culture, learn the traditions, the values, the teachings, the ceremonies, the language. The more I learn that, the more I learn about myself. The more I learn about myself, the more that I know where I can go. (Blue and Rogers Blue, 2001, p. 67).

Native ceremonies such as the sweat lodge, the vision quest, the pipe ceremony and the sentencing circle contribute in a crucial way to this process of healing, bringing the members of the community together to share their thoughts and stories, and to ponder their roots. Thus, individuals regain their sense of connectedness to the ancestors and to their community and renew their sense of obligation to that larger whole.

It is precisely the purposes of First Nations' ceremonies to retrace the track, regain the lost, and recreate community. First Nations' ceremonies have the function of restoring the individual's self-respect and an awareness of their roots. Through ceremonies individuals come to understand that they are connected not only to each other, but to their past, and to the present. They have a place and responsibility in their communities. The ceremonies nurture the spirit, thus strengthening both the individual and the community. (Blue and Rogers Blue, 2001, p. 69).

Recent developments in alternative sentencing programs in Canada, with particular focus on sentencing circles, reflect an attempt to address some of the concerns raised above, by integrating Aboriginal justice practices into the formal criminal justice system. Sentencing circles bring together the victim, offender and interested members of the community, along with appropriate legal actors, to discuss matters such as the circumstances surrounding the crime which has taken place, its impact on victims generally, on the community and on the victim, and what must be done to help heal the offender, victim and community and prevent the recurrence of such behaviour (Lilles, 2001). Incorporating elements of Aboriginal tradition (for example, prayers and the symbolic importance of the "circle"), the sentencing circle brings the sentencing process back to the community, for deliberation amongst those who are most affected by it.

While this initiative remains subject to judicial discretion, since *R. v. Gladue*, when the Supreme

Court effectively endorsed its use as an alternative to the sentencing hearing and gave approval to the principles of restorative justice, the practice of circle sentencing has become much more widespread. These initiatives reflect a growing awareness of and concern about the treatment of Aboriginal people by the criminal justice system (Roberts and Roach, 2003) and a recognition of the distinctiveness and importance of Aboriginal ideas about justice.

Of course, sentencing reform addresses only one aspect of the problem of marginalisation experienced by Aboriginal peoples in Canada. A comprehensive approach must attend to the long legacy of colonialism as it is manifested throughout Canadian society and in its political and social institutions.

### **Different Contexts, Shared Ideas**

What emerges from this discussion of restorative justice as it has come to prominence in these three distinctive political settings is a notable convergence around a common set of ideas, principles and concerns. Despite very different problem settings with differing stakes, restorative justice advocates in each case reveal a group of shared concerns and common beliefs about how they might be alleviated.

*Repairing harm.* All three usages of the discourse of restorative justice place a strong emphasis on repairing harm as the ultimate goal of the justice process. In each case, this harm is seen to extend beyond the primary victim to a larger community of interest; however, in the peacebuilding and criminology contexts, the victim is clearly primary. Interestingly, a major focus of the Aboriginal justice paradigm discussed in the Canadian case is the rehabilitation of the offender – while the restoration of balance within the community is central, it would seem that bringing the offender back into the fold, reacquainting them with their culture and with their placement within a larger whole is a crucial part of that process of repair.

*Rectifying inequalities.* Equality is an important theme in discussions of restorative justice. Justice, on this view, demands a levelling of the playing field: victims are empowered to voice their anger, articulate their pain and make demands of their victimizers, while perpetrators are encouraged to reckon with their crimes, admit their guilt and make amends to those they have harmed, often through some form of compensation.

*Countering retributive justice.* All three cases present restorative justice in some sense as a reaction against retributive justice; however, some restorative justice advocates are more willing than others to incorporate a punitive element within their justice paradigm. These debates are often internal to the cases examined above, as was evident in the criminology setting. In the peacebuilding case, retribution and punishment are simply relegated to a lower level of importance, subservient to the overarching goals of societal healing and reconciliation. Accountability, however, retains a central position in all discussions of restorative justice, though emphasis is placed on the active assumption of responsibility rather than receiving punishment.

*Democratic ideals: participation, deliberation, recognition.* Restorative justice, in all three cases, places strong emphasis on democratic ideals of participation, deliberation and recognition. Both victims and offenders are encouraged to take an active role in determining their fate, to voice their concerns and engage in a process of deliberation that will produce an outcome agreeable to all implicated. Victims' needs are recognized and made primary in the justice process. In the Aboriginal justice case, this dimension of recognition takes on an added significance, as Aboriginal values and principles are accorded a place in a largely Euro-centric criminal justice system.

*Individual and societal healing.* Finally, restorative justice, in all three cases, is concerned with healing – of the individual (the victim, and sometimes the perpetrator) and the

community. This is, fundamentally, what restoration appears to be all about: restoring a lost equilibrium (or perhaps creating one that was never there but should have been) to a society damaged by inequality and injustice, healing its wounds so that its members can move forward into a better, more equitable future.

## **Conclusion**

The diversity of contexts in which restorative justice discourse has arisen poses an important challenge for those interested in understanding how politics and ideas intersect in the public sphere and, more particularly, how *moral* ideas come to shift or evolve within different political, social and cultural contexts. Indeed, while the language of restorative justice has appeared in a wide range of contexts, in response to different kinds of problems, as we saw above, there is a common ideational core to this discourse, a significant set of ideas, criticisms and principles that persists despite important differences in the political, social and cultural conditions framing the language itself. This raises two sets of questions that merit further investigation. The first, more empirical line of questioning focuses on the meaning and origins of restorative justice. When and, more importantly, *why* did the discourse of restorative justice emerge? How can we make sense of an apparent ideational convergence around principles of restorative justice given the very different contexts in which this discourse has emerged?

The second set of questions concentrates more on the normative implications of restorative justice for how we think about justice and punishment, more generally. Moving beyond the frequently postulated retributive-restorative justice dichotomy, what are the implications of a commitment to restorative principles for social, moral and political responsibilities more broadly conceived? How does a commitment to restorative justice shape our responses to criminal acts, ranging from minor infringements of the law to crimes against



humanity? What do restorative principles entail for how we approach other issues of social justice, problems, for example, of distributive justice, political representation and historical injustice? Tracing the origins of an idea or term, the circumstances of its appearance and the reasons for its ascension within our moral and/or political lexicon, can help us gain a better understanding of what it means and its implications for how we live our lives.

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