



III Restorative Justice: New Ways to Look at Old Ideas *

By Amy Kaufman**

Abstract

Restorative justice allows us to respond to crime in ways that put the victim and the harm suffered at the centre. While our current criminal justice system focuses on rule-breaking and punishment, restorative justice allows for inquiry into what can be done to help the victim heal and can provide an opportunity for those who have caused harm to accept responsibility. Restorative justice, with its deep roots and widespread practice across Canada and the world, offers us new ways to look at criminal justice.

Sommaire

La justice réparatrice nous permet de réagir au crime de manière à mettre la victime et le préjudice subi au centre de la problématique. Bien que notre système de justice pénale actuel se concentre sur la violation des règles et la punition, la justice réparatrice permet d'enquêter sur ce qui peut être fait pour aider la victime à guérir et peut offrir une occasion pour ceux qui ont causé un préjudice d'en accepter la responsabilité. La justice réparatrice, avec ses racines profondes et sa pratique répandue partout au Canada et dans le monde, nous offre de nouvelles façons d'envisager la justice pénale.

Restorative justice offers opportunities to address crime and the harm it causes in new ways, but I don't remember hearing the phrase uttered once during law school. It was much later, after experiences working and volunteering in the justice system, that I started wondering if there were other ways to look at crime, and in particular, better ways to respond when people have been harmed. That's when I started learning about restorative justice, a concept that I have come to believe holds much promise to make our justice system more just and humane. While my own awareness of restorative justice may be new, the practices themselves are not. There are teachings in virtually every ancient spiritual tradition that support restorative justice practices.

Owing to the generosity of CALL/ACBD through the James D. Lang Memorial Scholarship, I was able to attend the 2015 National Restorative Justice Symposium in Quebec City, which helped broaden my knowledge of restorative justice – both within and beyond criminal justice settings. In this paper, I would like to share some of what I've learned so far, both from the conference and from my own research.

* © Amy Kaufman 2016

** Amy attended the National Symposium on Restorative Justice thanks to a James D. Lang award from CALL/ACBD. I am grateful to CALL/ACBD for making this possible. Many thanks to Simon Baron and Kate Johnson for their help with this paper.

Restorative Justice: A Different Way of Responding to Harm

Choosing how we as a society will approach harm – preventing, reducing and responding to it – requires us to decide how we will relate to one another. It obliges us to tackle difficult questions about what causes harm and how people can recover from harm done to them, and whether there is space for those who have harmed others to make any amends.

The principles of restorative justice have been translated into many different contexts, and its practices are flexible enough to be applied in many ways. But at its core it is about changing the way we respond to harm.

Our current criminal justice system seeks to address these questions:

1. What rule has been broken?
2. Who broke the rule?
3. What consequence/punishment should the rule-breaker receive?

Our justice system has much to be proud of, particularly in its procedural and evidentiary safeguards that continue to evolve to ensure as fair a trial as possible. But for all its strengths, there are some blind spots as well. For one thing, it is focused on rules and offenders, often to the exclusion of anything or anyone else: criminal offences are committed against society, not the person who was harmed. Put simply, the two essential elements of a guilty verdict are to prove *mens rea* and *actus reus*: that the accused person had both a guilty mind and did the guilty act. Once that guilty verdict is rendered, it's on to arguing about the appropriate sentence. At a recent symposium, the aphorism “tail ‘em, nail ‘em, and jail ‘em” was used to sum up this approach.

By contrast, after harm has occurred, someone working with a restorative justice framework might put the questions this way:

1. Who has been harmed?
2. What harm has been caused?
3. What can be done to help the victim(s) heal (and who should do it)?

With this second set of questions, the focus is on the victim, the harm, and the consequences of harm. The offender is still important, and may have a role to play in answering these questions, but the victim is at the heart of the inquiry. Tim Newell, a governor in the English prison system and a proponent of restorative justice, makes this distinction: “criminal justice is about laws, guilt and sanctions; restorative justice is about emotional, physical and material

harms and what can be done to make amends for them.”¹ While restorative justice might seem like an alternative approach to criminal justice, Newell argues that they can be complementary, but observes that such an understanding “would challenge us to find ways of combining the two in response to every crime, rather than offer two separate roads as choices.”²

Howard Zehr's Foundational Work

It would be difficult to discuss restorative justice without mentioning Howard Zehr's enduring book, *Changing Lenses: Restorative Justice for Our Times*, which was re-released as a 25th anniversary edition in 2015.³ Zehr is the co-director of the Zehr Institute for Restorative Justice and distinguished professor at the Center for Peacebuilding at Eastern Mennonite University in Virginia. While Zehr didn't invent the term “restorative justice,” he certainly brought it into popular use. “We in the West view crime through a particular lens,” he begins early in the book. “The ‘criminal justice’ process that uses that lens fails to meet many of the needs of either victim or offender. The process neglects victims while failing to meet its expressed goals of holding offenders accountable and deterring crime.”⁴

Zehr draws a distinction between retributive justice and restorative justice by defining them side by side:

Retributive Justice: Crime is a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules.

Restorative Justice: Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.⁵

“Crime involves injuries that need healing,” he explains in a subsequent passage.⁶ Those injuries occur to the victim, relationships, the offender, and the community. Our current system focuses on the harm to the state, with the state front and centre as the victim (the state as represented by our head of state, the Queen – so criminal cases are titled “*Regina v. Kaufman*,” or whoever the accused person is). Restorative justice programs emphasize the interpersonal dimensions of crime and concentrate on what can be done to repair the harm and promote healing.⁷ Victims need “an experience of justice” in order to recover, and each person's needs can be different.⁸ Zehr suggests some of the victim's needs that should be recognized, such as compensation for losses (restitution), answers to their questions, and opportunities to express their emotions, tell their stories and have their experiences validated. They also need to be

¹ Tim Newell, *Forgiving Justice: a Quaker Vision for Criminal Justice* (London: Quaker Home Service, 2000) at 43.

² *Ibid* at 43.

³ Howard Zehr, *Changing Lenses: Restorative Justice for Our Times*, 25th anniversary edition (Kitchener: Herald Press, 2015).

⁴ *Ibid* at 20.

⁵ *Ibid* at 183.

⁶ *Ibid* at 186.

⁷ *Ibid* at 186 - 188.

⁸ *Ibid* at 31-35.

empowered: how can they regain their sense of personal power and autonomy, which has likely been deeply violated by crime.⁹

After a crime has taken place, the person who committed the crime must be held accountable. When we look at the current criminal justice process, we should question whether it succeeds at this. “The intricate, painful, non-participatory nature of the process encourages a tendency to focus on the wrongs experienced by the offender, diverting attention from the harm done to the victim... At minimum, because the criminal process is complex and so offender-oriented, they are caught up entirely in their own legal situations,” Zehr observes.¹⁰ “Consequently, offenders are rarely encouraged or allowed to see the real human cost of what they have done.”¹¹

Zehr argues that “[w]ithout an intrinsic link between the act and the consequences, true accountability is hardly possible. And as long as consequences are decided for offenders, accountability will not involve responsibility.”¹² Zehr provides an alternative understanding of accountability: “an opportunity to understand the human consequences of one’s acts and to face up to what one has done and to whom one has done it... Accountability also involves taking responsibility for the results of one’s behavior. Offenders must be allowed and encouraged to help decide what will happen to make things right, then to take steps to repair the damage.”¹³

Many voices in the field of restorative justice belong to people of various faiths, and many restorative justice programs are run by prison chaplains or may be funded by faith or ecumenical groups, such as the Church Council on Justice and Corrections. However, restorative justice is not a religious movement and sits quite comfortably in a secular space and in our justice system. For example, the purposes and principles of sentencing in the *Criminal Code* include “to provide reparations for harm done to victims or to the community; and ... to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or the community.”¹⁴ The *Criminal Code* also explicitly contemplates the possibility of using “alternative measures” in relation to someone accused of a crime and sets up a broad framework for when this may be possible; it also directs sentencing courts to consider “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with harm done to victims or to the community... with particular attention to the circumstances of aboriginal offenders.”¹⁵ As Sujatha Baliga of the Restorative Justice Project writes in the introduction to the 25th anniversary edition of *Changing Lenses*,

“[w]hile the text is Christian in its framing, as a Buddhist and atheist, I find *Changing Lenses* to be a universal call for equal compassion for those who have experienced harm and those who caused it.”¹⁶

Canada's National Symposium on Restorative Justice

This annual symposium brings together psychologists, professors, educators, social workers, Correctional Services workers, First Nations leaders, lawyers, and anyone else who wants to consider how they could integrate restorative justice principles into their work. Many of these people have been doing restorative justice work for decades. In 2015, presenters came from the United States, France, and Belgium, along with many speakers and attendees who were from all over Canada, including a number of indigenous people. Beyond the interesting sessions, breaks and lunches provided time for thoughtful discussions with this diverse group.

Early in the Symposium, Mark S. Umbreit, the director of the Center for Restorative Justice and Peacemaking at the University of Minnesota, presented “Restorative Justice & Dialogue in the US: What Have We Learned from Practice and Research?”¹⁷ which made a big impression on me. He began his talk by acknowledging that in all his experience, he has learned the most from his indigenous colleagues and friends. He stressed the need to use both our hearts and minds. What we now call restorative justice or restorative principles has deep roots, and many speakers acknowledged that the practices owe much to the teachings and longstanding practices of many indigenous people and cultures.

There is no single form of restorative justice. Umbreit stressed that the restorative justice movement should be a “big tent,” not a “litmus test.” Restorative Justice has and needs proponents from all political and ideological stripes, or as he memorably put it, “There are many streams that flow into the healing river of transformative dialogue.” He highlighted that restorative justice can be expressed in many different ways; there is no “one size fits all.”

According to Umbreit, there is restorative justice legislation in 39 American states, sometimes figuring broadly and sometimes in small ways. He lauded Colorado’s achievement of being the first state to pass a bill that included sustainable funding for restorative justice. Thirty-one states allow for the victim of a crime to meet with the offender in prison. His home state, Minnesota, is now trying restorative justice in schools to avoid suspensions, and they are achieving very positive results.¹⁸ Restorative Justice has been endorsed

⁹ *Ibid* at 31 - 33.

¹⁰ *Ibid* at 46 - 47.

¹¹ *Ibid* at 47.

¹² *Ibid* at 46.

¹³ *Ibid* at 47.

¹⁴ *Criminal Code*, RSC 1985, c C-46, ss 718(e) – (f).

¹⁵ *Ibid*, ss 717, 718.2(e).

¹⁶ Sujatha Baliga, “Foreword” in Howard Zehr, *Changing Lenses: Restorative Justice for Our Times*, 25th Anniversary Edition (Kitchener: Herald Press, 2015) at 11.

¹⁷ Mark Umbreit, “Restorative Justice & Dialogue in the U.S.: What Have We Learned from Practice and Research?” (presented at the National Restorative Justice Symposium, 16-17 November 2015, Quebec City).

¹⁸ *Ibid*.

by organizations such as the American Bar Association in 1994¹⁹ and the UN in 2002.²⁰

The conference showcased many different restorative justice programs. But it also delved into the question of what unites these diverse initiatives and why, instead of accepting the current criminal justice system as it is, we should explore restorative justice.

Restorative Justice in Canada: Past, Present, and Future

While restorative justice has not been prominent in the Canadian criminal justice landscape in recent years, I learned at the conference that Canada played an important early role in integrating restorative justice programs into the existing criminal justice framework.

Canada is acknowledged as an early leader in restorative justice and is widely credited with initiating the first restorative justice program. In 1974, two youths had been convicted of vandalizing 22 properties in Elmira, Ontario. Due to the intervention of a probation officer and the coordinator of Voluntary Service workers for the Mennonite Central Committee in Kitchener, and a judge who was willing to explore sentencing alternatives, the two youths visited the homes of all the victims still in the area and negotiated restitution with each one.²¹ This is considered the original Victim-Offender Reconciliation Program. Such programs have multiplied and evolved since that first one and today are often called Victim-Offender Dialogue or Victim-Offender Conferencing programs.²² One of the mediators responsible was a man named Mark Yantzi, who went on to do very powerful work as a mediator in Canadian federal corrections as well as maintaining a practice in Kitchener-Waterloo. At the end of this article there is a link to a video of Yantzi himself telling “the Elmira Story.” He taught for many years in the Restorative Justice Program at the Queen’s University School of Religion. Unfortunately that program folded a few years ago, but for more than ten years, it was a force for restorative justice in our country.

There are encouraging signs that restorative justice programs may once again be growing in Canada. In Prime Minister Justin Trudeau’s November 2015 mandate letter to Ms. Jody Wilson-Raybould, the Minister of Justice and Attorney General of Canada, one of her most important charges is to “conduct a review of the changes in our criminal justice system and sentencing reforms over the past decade...”, with one of the prescribed outcomes being “increased use of restorative justice processes and other initiatives to reduce the rate of incarceration amongst Indigenous Canadians[.]”²³

But restorative justice isn’t just for Indigenous Canadians;

non-Indigenous Canadians have much to gain from restorative justice practices as well, and from recognizing and learning from their existing and traditional use in Indigenous communities. In a workshop on “Restorative Justice in Education: Reflexive and Critical Practice,” Brenda Morrison, Co-Director of the Centre for Restorative Justice at Simon Fraser University, stressed the need for community participation in restorative justice. She pointed out that the state can’t do it alone; its institutions weren’t designed for this. Instead, the state must create the backdrop for the community to stand up. It must be a partnership between the state and community. She also acknowledged the centrality of indigenous practitioners and their traditions and structures in informing and inspiring restorative justice practices.²⁴ People are taking on this work; it just doesn’t often make the headlines. Many Canadians from all walks of life are going about this work with passion and commitment but without acclaim. There are a host of Canadian authors, speakers, professionals, and volunteer activists who engage in this work and have powerful stories to tell and convincing statistics to offer.²⁵

Learning about restorative justice has made me realize the need to question how our current justice system is serving Canadians. Understanding that there are other ways to respond to crime and harm reminds me that every justice system is designed by people, based on particular goals from a particular time. Our legal system, with its solemn responsibilities and profound impact on so many people, should always be open to questions, innovation and change.

Further Reading, Viewing and Listening: Experiences of Restorative Justice in Canada

CBC, The Current, “Game Changer: Shannon Moroney’s Story” (11 October 2011), online: <http://www.cbc.ca/player/play/2151626162>

Community Justice Initiatives Waterloo Region, “Mark Yantzi tells the Elmira Story” (uploaded 16 February 2011), online: <https://www.youtube.com/watch?v=9vBHgeWs0UK>

Katy Hutchison, “Restorative Practices to Resolve/Build Relationships” (11 May 2013) TEDx West Vancouver ED, online: <https://www.youtube.com/watch?v=wcLuVeHlrSs>

Wilma Derksen, “When Polarity in Forgiveness Happens,” (9 February 2012) TEDx Manitoba, online: https://www.youtube.com/watch?v=U7Byq9sW_XU

Shannon Moroney, *Through the Glass* (Toronto: Doubleday, 2011)

¹⁹ American Bar Association, “Recommendation,” Report No. 3 of the Criminal Justice Section, in *Annual Report of the American Bar Association*, Vol. 119, no. 2 (Chicago: Headquarters Office, 1994) at 332-335. The recommendation was approved (see note on page 332 of report).

²⁰ UN ECOSOC Resolution 2002/12, *Basic principles on the use of restorative justice programmes in criminal matters*, online: <<http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf>> (13 August 2002).

²¹ Zehr, *supra* note 3 at 159-161

²² *Ibid* at 161.

²³ Prime Minister of Canada Justin Trudeau, “Minister of Justice and Attorney General of Canada Mandate Letter” [n.d.], online: <<http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>>.

²⁴ Brenda Morrison, “Restorative Justice in Education: Reflexive and Critical Practice” (presented at the National Restorative Justice Symposium, 16-17 November 2015, Quebec City, QC).

²⁵ See, for example, “Further Reading, Viewing and Listening: Experiences of Restorative Justice in Canada” at the end of this article.