"I wanted a textbook that would help the students understand how restorative justice practices help to repair the harms of both victims and offenders, and how both are reintegrated into the community. This is especially important and useful when I use the textbook in the correctional facility. After reading the textbook, students understand how their actions affect other people and they learn to take responsibility for those actions."
Linda Keena, *Associate Professor of Criminal Justice and Legal Studies, Legal Studies Program Coordinator, University of Mississippi*

"I like the accessibility of the text--perfect for the introduction of issues to undergraduate students. I also think it frames the concepts of restorative justice in a unique way that other "intro to RJ" texts do not.... The authors are careful with their choice of words and citations, so it is also a trusted source for me as a professor."
Emily Gaarder, *Director of the Center for Restorative Justice and Peacemaking and Associate Professor in Studies in Justice, Culture, and Social Change, University of Minnesota Duluth*

Restoring Justice: An Introduction to Restorative Justice, Sixth Edition, offers a clear and convincing explanation of restorative justice, a movement within criminal justice with ongoing worldwide influence. The book explores the broad appeal of this vision and offers a brief history of its roots and development as an alternative to an impersonal justice system focused narrowly on the conviction and punishment of those who break the law. Instead, restorative justice emphasizes repairing the harm caused or revealed by criminal behavior, using cooperative processes that include all the stakeholders. The book presents the theory and principles of restorative justice, and discusses its four cornerpost ideas: Inclusion, Encounter, Repair, and Cohesion. Multiple models for how restorative justice may be incorporated into criminal justice are explored, and the book proposes an approach to assessing the extent to which programs or systems are actually restorative in practice. The authors also suggest six strategic objectives to significantly expand the use and reach of restorative justice and recommended tactics to make progress towards the acceptance and adoption of restorative programs and systems.

Daniel W. Van Ness has explored and promoted restorative justice as public policy advocate, program designer, writer, and teacher for 35 years. He received the John W. Byrd Pioneer Award for Community and Restorative Justice from The National Association of Community and Restorative Justice in 2013.

Karen Heetderks Strong has worked on restorative justice theory and principles since the late 1980s. She spent 22 years in an American non-profit serving prisoners, ex-prisoners, crime victims, and their families and supporting advocacy for reforms in the state and federal criminal justice systems.

Jonathan Derby has worked more than 16 years with non-profit organizations in India that help the most vulnerable access justice. Currently, he serves as Special Advisor on Restorative Justice with Prison Fellowship International and teaches restorative justice as adjunct professor at Straus Institute of Dispute Resolution, Pepperdine Caruso School of Law.

L. Lynette Parker is a consultant providing restorative practice training and guidance having provided services to organizations in 17 countries. As a restorative conferencing facilitator, she has guided victims, offenders, and community members through restorative processes in over 70 criminal cases ranging from shoplifting to reckless driving resulting in death.

CRIMINAL JUSTICE / RESTORATIVE JUSTICE

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RESTORING JUSTICE SIXTH EDITION

DANIEL W. VAN NESS • KAREN HEETDERKS STRONG
JONATHAN DERBY • L. LYNETTE PARKER

Routledge

SIXTH EDITION

RESTORING JUSTICE

AN INTRODUCTION TO RESTORATIVE JUSTICE

DANIEL W. VAN NESS
KAREN HEETDERKS STRONG
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ROUTLEDGE

RESTORING JUSTICE

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Endorsements of Previous Editions of *Restoring Justice*

"As a crime victim, victim advocate, and long-time supporter of restorative justice values and principals, I found *Restoring Justice* to be an excellent resource for anyone interested in the complex world of restorative justice history, processes, and ideas. Bravo to Dan Van Ness and Karen Strong for offering a balanced approach to restorative justice that understands "real" justice is about repairing the harm and healing those who have been harmed by crime: victims, offenders, and communities. *Restoring Justice* is a well-written and quite often inspirational book!"

—Ellen Halbert, *Director, Victim/Witness Division, Travis County District Attorney's Office, Austin, Texas*

"At each edition of *Restoring Justice,* Daniel Van Ness and Karen Heetderks Strong set the standard and make their volume one of the basic books—or perhaps the basic book—on restorative justice.

Their book reflects the richness of the restorative justice approach, through process analyses with clinical relevance, theoretical thinking with social ethical and social significance, principled exploration on juridical options, and a broad sociological context analysis. Van Ness and Heetderks Strong colour this broad interdisciplinary picture with their own visions and options. In doing so, they deliver a crucial contribution to understanding restorative justice principles and their proper implementation.

Restoring Justice is the result of intensive commitment to the values of restorative justice, balanced with a constructive critical mind for possible problematic implementations, and openness for unanswered questions and unresolved difficulties. It is a landmark in the restorative justice literature."

—Lode Walgrave, *Emeritus Professor of Criminology, Faculty of Law, Catholic University of Leuven*

"*Restoring Justice* is the best, most thorough text on the most important development in the justice system in the last decade: restorative justice.… a seminal work.… this book does a wonderful job of describing the rationale, presenting the arguments, confronting the criticisms.… provides a measured, reliable statement on our need to restore justice."

—Todd Clear, *University Professor of Criminal Justice, Rutgers University School of Criminal Justice*

"… a great introductory overview of restorative justice … easily understood while also providing significant depth.… draws together the significant insights in the field while making several new contributions… invites and encourages change without alienating people who are currently working in the field. I recommend *Restoring Justice* for both the novice and the seasoned restorative justice reader."

—Ron Claassen, *Co-owner, Restorative Justice Discipline, Fresno and former Director of the Center for Peacemaking and Conflict Studies, Fresno Pacific University*

"… an exceptionally good job of clearly articulating the underlying principles and values of restorative justice, including many practical examples. This book will serve as a primary resource for scholars and practitioners involved in the restorative justice movement as it continues to expand."

—Mark Umbreit, *Professor and founding Director of the Center for Restorative Justice & Peacemaking, School of Social Work, University of Minnesota*

"[In Restoring Justice, Dan Van Ness and Karen Strong] challenge researchers and scholars to move beyond measuring only recidivism as the ultimate outcome of evaluation, and victim and offender satisfaction as the primary intermediate measures. Based on this work, we may now instead build upon core principles to develop dimensions and measures of process integrity, as well as theoretical dimensions to assess intermediate outcomes for victim, offender, and community."

—The late Gordon Bazemore,
former Professor of Criminology and Criminal Justice Florida Atlantic University

RESTORING JUSTICE

An Introduction to Restorative Justice

Sixth Edition

DANIEL W. VAN NESS
KAREN HEETDERKS STRONG
JONATHAN DERBY
L. LYNETTE PARKER

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Contents

Preface

Restoring Justice is an introduction to the theory, principles, and practices of restorative justice. When it was first published in 1997, restorative justice was still relatively unknown although it had begun to gain some traction, especially in juvenile justice cases. The book's purpose then, as now, was to introduce restorative justice to those who are unfamiliar with it.

Today, restorative justice is a generally familiar term, although there are divergent views about what it is and how it should be applied. As with previous editions, this book is primarily about the application of restorative justice to criminal justice, although it mentions some of the wider applications of restorative and "transformative" thinking and practices.

Dan and Karen's work on restorative justice began in the mid-1980s when the criminal justice advocacy organizations for which we worked undertook development of a model built on what was then a largely unknown and incomplete theory called restorative justice. The organization was Justice Fellowship, a criminal justice reform affiliate of Prison Fellowship Ministries® and Prison Fellowship International®. A remarkable set of colleagues were engaged in exploring the theory, principles, and practices of restorative justice. The prefaces to previous editions acknowledged these colleagues and partners who were instrumental in developing our understanding of it. We remain grateful for their invaluable contributions and are also encouraged by the next generation of scholars and practitioners, whose insights and critiques continue to shape restorative justice. Two such contributors, Lynette Parker and Jonathan Derby, have joined us as co-authors for this edition.

In this sixth edition of our textbook, we have made some significant changes beyond simply updating program information and incorporating more recent sources. One of these is the *terminology* we use. Previous editions of this book used the terms *victim* and *offender*. But these labels put the focus on negative deeds and experiences, rather than on the humanity and potential of the people involved. Furthermore, such terms can oversimplify the complex personal, social, and economic realities that complicate fault, blame, cause, and effect. So, in this edition, we use terms such as *person who was harmed*, and *person responsible for the harm*. Occasionally, this terminology is a little cumbersome, but we have accepted this downside because it is outweighed by our commitment to the dignity and value of each person who is involved, which is inherent to the values of restorative justice. We have learned from others in the field who also share this commitment.

In the following chapters, we consider why so many people throughout the world believe that criminal justice needs a new vision, and we offer a brief history of the development of restorative justice. We present our understanding of the meaning of restorative justice and discuss its conceptual and practical cornerposts of inclusion, encounter, repair, and cohesion. We then explore how restorative justice ideas and values are being (and might be) integrated into policy and practice. Finally, we discuss the challenges in shifting the criminal justice paradigm toward restorative justice, and the reasons we are full of hope for personal and institutional transformation. Appendices provide a case study showing how restorative justice is applied and a list of restorative justice programs and applications across the globe.

For those who have previously used *Restoring Justice* in teaching, we want to clarify what has changed in this edition compared to the previous one. One is that throughout the book, we have

sought to include insights and examples from non-European cultures to a greater extent than in the past. And, of course, we have updated our sources and information. There are also other changes to the structure and content of the book.

Part 1 (The Concept of Restorative Justice) has three chapters, as before.

Chapter 1, "How Patterns of Thinking Can Obstruct Justice," still discusses patterns of thinking, looks back at ancient roots of a more relational approach to justice, and gives a brief history of how the pattern has shifted to a more impersonal, government-centered concept of criminal justice. We have added information about the consequences of the current pattern in mass incarceration and the war on drugs. And the chapter closes with an invitation to consider an alternative pattern. Content about reform efforts has been moved to Chapter 2.

Chapter 2, "The Development of a New Pattern of Thinking," discusses the origins of the term "restorative justice" and goes on to explore reform movements and indigenous practices that have contributed to the development of restorative justice. Some of this content was previously found in Chapter 1. The chapter concludes with a discussion about early explorers of restorative justice theory. The "Time Line of Significant Advances Concerning Restorative Processes" has been taken out of the book, given the rapid pace of change and development throughout the world. But we have added, in Appendix 2, a table showing ways restorative justice is being used throughout the world.

Chapter 3, "Justice That Promotes Healing," still presents the concept, definition, principles, and values of restorative justice, though the order of the content has changed a bit. Our definition and three principles are essentially the same, but in the brief presentation of "cornerpost values," we have replaced "amends" with "repair" to widen the consideration from the obligation of the person causing harm to the needs of all the parties, including the need for repair of structural issues that affect justice. We've also replaced "reintegration" with "cohesion" to underscore the importance of building community strength, so that communities are able to provide the means and opportunity to assist both persons harmed and those responsible for harm. This is more fully developed in Chapter 7.

The four chapters of Part 2 (The Cornerposts of Restorative Justice) still present the four "cornerpost values" of restorative justice. But we have made noticeable alterations especially to Chapters 5–7.

Chapter 4, "Inclusion," is not significantly changed.

Chapter 5, "Encounter," begins with a different story than previously. It describes an actual encounter, based on the experience of one of the co-authors. It goes on to define what is meant by "encounter" and continues to discuss various kinds of processes that function to bring the parties together in a restorative way. New to this chapter is the issue of trauma for participants in an encounter. The chapter also introduces the benefits of restorative justice for creating opportunities for connection between the parties involved, in contrast to contemporary criminal justice, where disconnection is inherent in the justice processes and their consequences.

Chapter 6, "Repair" (formerly "Amends"), discusses the needs of people who have been harmed by crime, adding a section on trauma-informed support and assistance. It goes on, as before, to explore the aspects of meaningful amends, including restitution, but has a new section on justice-informed considerations affecting repair and restitution.

Chapter 7, "Cohesion" (formerly "Reintegration"), begins with a different story than formerly. It presents a prison in Brazil that operates on a radically different model than most, one that is rooted in relationships, respect, and resilience—the three elements of cohesion. These three elements are woven throughout the chapter. There is a significant emphasis on trauma and trauma-informed community-building, in view of the stresses and challenges in some communities and how that affects their capacity to be reintegrative for persons harmed by crime, and especially people returning from incarceration.

Part 3, "The Challenges Facing Restorative Justice," still has three chapters but Chapters 8 and 9 are significantly revised. The contents of Chapters 8 and 9 are flipped in this edition. Chapter 8, "Toward a Restorative System" (formerly "Making Restorative Justice Happen") presents the five systems models for incorporating restorative justice. The chapter also discusses how restorative justice fits into the various stages of criminal justice proceedings. Formerly, these were presented as uses by

the police, prosecutors, courts, and so on. And finally, there is a revised section suggesting a method to assess the "restorativeness" of a system or program.

Chapter 9, "Shifting to a Restorative Paradigm," presents six strategic objectives to expand the use of restorative justice. All six of these objectives are different from the goals in Chapter 8 of the previous edition. This chapter also contains significantly revised content about what is needed to "make restorative justice happen" than was previously found in Chapter 8.

As in previous editions, we have concluded the book with Chapter 10, "Transformation," discussing transformation and reasons for hope. This chapter has been revised, but its direction is similar to previous editions.

In preparing this book, we have sought to incorporate what we have learned from an increasingly diverse group of scholars and practitioners, policymakers, and influencers who lead the movement for restorative justice. The involvement of growing numbers of people of color and indigenous people is a wonderful sign of a maturing movement. Many of the helpful changes in this edition are the result of Jonathan and Lynette's fresh insights and current awareness of developments and critiques of restorative justice. For Dan and Karen, this is a natural way to bring in the next generation of scholars with a heart for this movement.

We desire this volume to be a useful text for both teachers and students, and hope it stirs discussions and debates that will stimulate further thinking about justice. We recognize that in looking at restorative justice, we bring our own lenses as White, privileged men and women. This is why we are especially grateful to learn from the perspectives of others, an ongoing process as we strive to understand more fully and advocate more effectively.

As people of faith, our hearts are stirred both with a desire for a more just world and hope that more restorative responses to crime can bring about increased healing and peace in communities and individual lives.

We dedicate this sixth edition to the restorative justice thinkers, practitioners, policymakers, critics, and champions who have been wonderful teachers and colleagues to us and who have kept restorative justice growing and adapting to meet the challenges and opportunities of a changing world. We particularly honor Dr. Gordon Bazemore (1952–2021), a friend and scholar whose life work made a lasting impact for good. Gordon helped shape the restorative justice movement from its early development and was directly instrumental in the Balanced and Restorative Justice (BARJ) Project in the United States, beginning in 1992 when he first made his case for a "balanced approach." Through BARJ, restorative justice principles were put into action across the United States in juvenile justice systems, courts, policing, policymaking, victim services, and community efforts. It continues to be instrumental. Gordon's writing, training, collaboration (and yes, his humor) are a significant reason why restorative justice is known and respected today.

Acknowledgments

We certainly do not claim to be the first or principal proponents of restorative justice. At every stage of our journey, we have benefited from the insights, questions, research, writings, experience, and practical contributions of scholars and practitioners around the globe. Our best ideas are the result of interaction with the remarkably generous, creative, and courageous people in this field. Although these individuals may not agree with all our conclusions, their contributions have enriched and strengthened our work and that of restorative justice advocates and practitioners throughout the world.

Excerpts from other previously published works by Daniel W. Van Ness have also been used by permission in this volume. These works and publishers are as follows: "Preserving a Community Voice: The Case for Half-and Half Juries in Racially-Charged Criminal Cases," *John Marshall Law Review* 28, 1 (1994), is used courtesy of The John Marshall Law School. "New Wine and Old Wineskins," *Criminal Law Forum* 4, 2 (1993), and "Anchoring Just Deserts," *Criminal Law Forum* 6, 3 (1995), are used courtesy of Criminal Law Forum, Rutgers Law School. Adapted excerpts from "Restorative Justice" in *Criminal Justice, Restitution, and Reconciliation*, edited by Burt Galaway and Joe Hudson (1990); from "Restorative Justice and International Human Rights" *in Restorative Justice: International Perspectives*, edited by Burt Galaway and Joe Hudson (1996); and from "Legal Issues of Restorative Justice" *in Restorative Juvenile Justice: Repairing the Harm of Youth Crime*, edited by Gordon Bazemore and Lode Walgrave, are used with permission from Criminal Justice Press, P.O. Box 249, Monsey, New York 10952. The review of uses of restorative justice processes in the criminal justice system in Chapter 8 was drawn from a paper Van Ness prepared for the Workshop on Enhancing Criminal Justice Reform, Including Restorative Justice, conducted on April 11, 2005, at the United Nations 11th Congress on Crime Prevention and Criminal Justice held in Bangkok, Thailand. The RJ City® Case Study in Appendix 1 and material drawn from RJ City®: Phase 1 Final Report (December 2006, revised August 2010) are used with permission from Prison Fellowship International.

"Making Peace" by Denise Levertov, is from BREATHING THE WATER, copyright© 1987 by Denise Levertov. It is reprinted in Chapter 10 by permission of New Directions Publishing Corporation.

Our front cover shows an example of Kitsugi pottery, a Japanese artform that mends broken pieces with gold. It transforms the object into something more beautiful than before it was broken. We think this is an apt metaphor for restorative justice. Copyright© Getty Images, Marco Montalti.

We especially thank our many former colleagues at Justice Fellowship, Prison Fellowship, and Prison Fellowship International. As we have prepared each edition of *Restoring Justice*, we have been continually reminded of the formative and highly meaningful interaction among these individuals as we worked together to challenge, articulate, and refine ideas about restorative justice and ways those ideas can bear fruit.

We are also indebted to our colleague, Sir Kim Workman, for permitting us to use a story from his personal papers in Chapter 2, and to the Counsel to Secure Justice in New Delhi, India and the project's lead editor Arti Mohan, for their generosity in sharing a portion of their extensive work, presented here as Appendix 2, "Restorative Justice Across the World." We are grateful to Straus Institute for Dispute Resolution at Pepperdine Caruso School of Law for access to their library and online tools.

We are learners and sojourners in the work of restorative justice. Most of what we have come to understand, we received from others. We thank the generous people who have gone before us, including the aboriginal peoples of the world who have preserved restorative approaches for centuries

and also the wonderful people who travel the road with us today. We are very grateful for the ongoing encouragement of our publisher, who has kept the book in print since 1997. We especially thank Ellen Boyne for her wise and skillful editing from the first edition until now, as well as Kate Taylor and others whose diligence has helped bring this edition to print. We are also shaped by our faith in God, who steadily leads us into a deeper understanding of true peace—shalom—and inspires us toward that goal.

Daniel W. Van Ness
Karen Heetderks Strong
Jonathan Derby
L. Lynette Parker
Autumn 2021

Part 1

THE CONCEPT OF RESTORATIVE JUSTICE

1

HOW PATTERNS OF THINKING CAN OBSTRUCT JUSTICE

Key Concepts

- Patterns of thinking—their strengths and limitations
- An ancient pattern of thinking about justice: Justice is relational
- Historical shifts in thinking about crime
- Current pattern of thinking: Justice is impersonal
- Restorative Justice: An alternative pattern

PATTERNS OF THINKING

The young woman watched intently as the man who raped her was sentenced to prison. But as the person convicted of rape was escorted from the courtroom, it was clear to Justice John Kelly that she was no less distraught than she had been throughout the court proceedings. So, before the next case was called, Justice Kelly asked the woman to approach the bench. He spoke with her briefly and quietly about what had just happened, and he concluded with these words: "You understand that what I have just done here demonstrates conclusively that what happened was not your fault." At that, the young woman began to weep and fled from the courtroom. When Justice Kelly called her family several days later, he learned that his words had been words of vindication for the woman; they marked the beginning of her psychological recovery. Her tears had been tears of healing.

A short time later, this Australian judge spoke at an international conference on criminal law reform held in London. Speaking to 200 judges, legal scholars, and law reformers from common law countries, he laid aside his prepared comments and spoke with great feeling about the need for criminal law practitioners to view themselves as healers. A purpose of criminal law, he said, should be to heal the wounds caused by crime—wounds such as those of the woman who had been raped. For her, even the conviction and sentencing of the man who had done this to her had not been enough.

The rehabilitation model of criminal justice has been the most influential school of thought in criminology in the past 200 years. Although the model fell into disrepute among criminal justice policymakers in the latter decades of the twentieth century, opinion surveys suggest that the desire to rehabilitate people who have harmed others through crime remains strong among members of the general public and even many people who have been harmed.[1] At a fundamental level, we recognize that criminal justice should consider not only whether those accused of committing crimes have violated the law but also why they have done so. However, even when rehabilitation programs

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are helpful in addressing the underlying problems that led to the decision to commit a crime, those programs fail to address all the harm surrounding the crime. Crime is not simply lawbreaking; it also harms others. In fact, that is often why those activities have been criminalized—to prevent those injuries from happening.

Crime is not simply lawbreaking; it also harms others. That is: the reason for criminal laws to prevent those injuries from happening.

As we will see, these injuries exist on several levels and are experienced by those who were directly harmed, by their communities, and even by the persons who caused the harm. However, the current policies and practice of criminal justice focus almost entirely on the lawbreaker, filtering out virtually all aspects of crime except questions of legal guilt and punishment. This is because a set of assumptions, or a pattern of thinking, structures our perception of crime and, consequently, our sense of what a proper response should be. Howard Zehr's description of paradigms is pertinent here: "They provide the lens through which we understand phenomena. They shape what we 'know' to be possible and impossible. [They] form our common sense, and things which fall outside … seem absurd."[2]

Patterns of thinking are necessary because they give meaning to the myriad bits of data we must deal with in life. Edward de Bono uses the example of a person crossing a busy road:

> If, as you stood waiting to cross the road, your brain had to try out all the incoming information in different combinations in order to recognize the traffic conditions, it would take you at least a month to cross the road. In fact, the changing conditions would make it impossible for you ever to cross.[3]

To avoid this problem, the brain uses "active information systems" to organize data into patterns of thinking that allow us to quickly make sense out of the chaos of information that would otherwise overwhelm us. A pattern of thinking is like the collection of streams, rivulets, and rivers formed over time in a particular place by the rainfall; once the pattern of water runoff is established, rainwater will always flow there, and nowhere else.

A fundamental weakness of patterns of thinking is that they limit what we perceive; we see only what makes sense in the pattern.

However, the reason for their usefulness is also a fundamental weakness of patterns. They limit the data we perceive. We see only what makes sense in the pattern; we simply do not recognize "absurd" information. Therefore, one sign that a pattern of thinking has become deficient is that we increasingly encounter troublesome data that do not fit. We are then forced to make a choice either to disregard that evidence or to seek a new pattern. For example, at one time, scientists believed that the Earth was flat, and that the universe revolved around it. However, as astronomers recorded the actual movement of heavenly bodies, this model became increasingly less satisfactory. When Copernicus proposed that the Earth revolves around the sun—not the other way around—his model offered a much more satisfactory explanation of observable data.

It is normal to think that the way we understand or do something is not only the *right* way but also the *only* way, until we encounter other approaches and recognize that they present alternatives. We may not adopt those alternatives, but the benefit to having encountered them is that we realize we have choices. The idea of neuroplasticity has emerged from a recent change in scientific understanding of

how the brain works. It is not, as was thought for 400 years, a machine whose parts have pre-assigned, specific functions. Rather, the brain not only shapes mental activity, but it is shaped by mental activity. Patterns of thought need not be static, but can change.[4] When people travel abroad, read, watch television programs, go to museums, listen to podcasts or music, they discover that other people in other times and places have made different choices, and that those choices have had consequences. And even as they experience differences, they also notice things they have in common and may come to a changed understanding of what it means to be human.

Exposure to other ways of doing things helps us recognize patterns of thinking, allows us to reflect on alternative approaches, and offers us the opportunity to make choices.

In other words, exposure to other ways of doing things helps us recognize patterns of thinking, allows us to reflect on alternative approaches, and offers us the opportunity to make choices.

Consider criminal justice. When we hear about a crime, we "know" that someone has been charged with breaking a law. That law may be justified on the grounds that it protects individuals (like laws about burglary), the community (like laws about drug dealing), or the government (like laws about paying taxes). We also "know" that there are laws to protect those who have been harmed, and that the person responsible for the crime should be caught and held accountable for breaking those laws. We "know" that criminal cases involve government prosecution of people accused of causing criminal harm to determine whether they did in fact break the law. We also "know" that those who are guilty are sent to prison as punishment or may be "given a break" and placed on probation. We may have opinions about whether the person was actually guilty, or about whether the sentence was just, but we seldom, if ever, question the underlying assumptions of the process. Crime is lawbreaking; the focus after crime should be on the person we believe did it, and once found guilty they should be punished, such as by having their liberty taken away or curtailed in some way.

Yet, nagging questions surface from time to time, prompted by events or intuitions that do not fit neatly within the pattern. Perhaps the most profound and obvious ones have to do with the people who were harmed. Why are some so dissatisfied with how the criminal justice system treats them? Is it wrong when they want to have a say in how the police conduct the investigation, or how the prosecutor presents the case, or what sentence the judge gives the person convicted of harming them?

If the criminal justice system is fair, why are people of color and other marginalized groups so disproportionately impacted when compared to their representation in the population? Imprisonment has a long-lasting negative relationship to the ability of those who have been locked up to reestablish themselves when they return to society. Instead of reducing crime, imprisonment results in high rates of repeat offending among those who did time before. Yet, US incarceration rates increased fivefold between the early 1970s, when it was less than 100 people per 100,000, until it peaked in 2007 at 762 people per 100,000. Only then did policymakers take notice of the financial impact of this practice, and incarceration rates began a slight decline. As we will see, the institutions of criminal justice were developed in large part to achieve rehabilitation. For two centuries, Americans and Europeans have experimented with a succession of programs to accomplish this purpose. Every attempt has ended in disappointment. Is there anything we could do differently that might get better results?

We suggest in this book that the way we think about crime is inadequate. By defining crime as lawbreaking and then concentrating on the adversarial relationship between the government and the defendant, we fail to address—or even recognize—certain fundamental reasons for, and results of, criminal behavior. Moreover, we fail to recognize the fruits, or outcomes, our justice systems produce. Adding new programs to an inadequate pattern of thinking is not enough if what is needed is a different pattern. That is what this book proposes.

Adding new programs to an inadequate pattern of thinking is not enough if what is needed is a different pattern.

It is not as though our current approach to criminal justice is the only one. There have been times and places when crime was viewed far more comprehensively—as an offense against the people harmed, their families, the community, and society. The goal of justice was to satisfy the parties, and the way to do that included making things right by repairing the damage to those parties, whether the damage was physical, financial, or relational. This is different from an approach that defines crime solely as an offense against the government, and whose goal is crime prevention through rehabilitation, incapacitation, and deterrence.

Let us explore these patterns more closely.

AN ANCIENT PATTERN: JUSTICE IS RELATIONAL

The legal systems that form the foundation of Western law did not view crime solely as a wrong to society. Although crime breached the common welfare so that the community had an interest in—and responsibility for—addressing the wrong and punishing the person who caused these harms, the offense was not considered a crime against the state, as it is today. Instead, it was also an offense against the persons harmed and their families. Consequently, those who caused harm and their families were required to settle accounts with the persons harmed and their families in order to avoid cycles of revenge and violence. This was true in small non-state societies, with their kin-based ties, but attention to the interests of people harmed by crime continued after the advent of states with formalized legal codes. The Code of Hammurabi (*ca.* 1700 BCE) prescribed restitution for property offenses, as did the Code of Lipit-Ishtar (1875 BCE). Other Middle Eastern codes, such as the Sumerian Code of Ur-Nammu (*ca*. 2050 BCE) and the Code of Eshnunna (*ca*. 1700 BCE), provided for restitution even in the case of violent offenses. The Roman Law of the Twelve Tables (449 BCE) required people convicted of theft to pay double restitution unless the property was found in their houses, in which case they paid triple damages; for resisting the search of their houses, they paid quadruple restitution. The Lex Salica (*ca*. 496 CE), the earliest existing collection of Germanic tribal laws, included restitution for crimes ranging from theft to homicide. The Laws of Ethelbert (*ca*. 600 CE), promulgated by the ruler of Kent, contained detailed restitution schedules that went so far as to distinguish the value, for example, of each finger and that of its nail. Each of these diverse cultures retained an expectation that those who cause harm, and their families, should make amends to the people who were harmed and their families—not simply to ensure that injured persons received restitution, but also to restore community peace. Peace was important in small kin-based societies because every family living in it was important to the defense of the community from outside threats.

While an individualistic, retributive voice of justice dominates Western criminal justice approaches, a more communal, reparative voice calling for justice that heals (to which Justice Kelly alluded) exists in many other cultures and religious traditions.

While an individualistic, retributive voice of justice dominates Western criminal justice approaches, a more communal, reparative voice exists in many other cultures and religious traditions.

In the Judeo-Christian tradition, the word *shalom* describes the ideal state in which the community should function. It means much more than the absence of conflict; it signifies completeness, fulfillment, and wholeness—the existence of right relationships among individuals, the community, creation, and God. It was a condition in which, as Ron Claassen says, no one is afraid.[5]

Fundamental to the concept of *shalom* is that individuals are interconnected in a web of relationships. When crime occurs, it ruptures right relationships and creates harmful ones. It tears apart *shalom*. Justice, then, restores *shalom*. It heals individuals and reconciles broken relationships and communities that have been harmed by crime.

Although restitution formed an essential part of these ancient justice processes, it was not understood to be an end in itself. The Hebrew word for restitution, *shillum*, derives from the same root as *shalom*, implying that it was related to the reestablishment of community peace. Along with restitution came the notion of vindication of the person who was harmed and the law itself. This concept was embodied in another word, also derived from the same root as *shalom* and *shillum—shillem*. *Shillem* can be translated as "retribution" or "recompense," not in the sense of revenge (that word derives from an entirely different root), but in the sense of satisfaction or vindication. In short, a purpose (but by no means the only purpose) of the justice process was, through vindication and reparation, to restore a community that had been eroded by crime.

Similarly, in Islam the word *salaam* signifies peace, health, and well-being. It forms part of the common greeting "*Assalamu Alaikum*" and conveys a desire for peace and wholeness to the one being greeted.[6] Islamic law shares some values with restorative justice, including respect for the other's dignity based on the interconnectedness of the entire community.[7] Although the Qur'an does not consider it appropriate to handle all crimes this way, it permits restorative approaches in *qisas* crimes (involving intentional and unintentional murder and intentional and unintentional physical harm) and *ta'zir* crimes (embezzlement, perjury, sodomy, usury, breach of trust, abuse, and bribery).[8]

The Qur'an also places a high value on forgiveness in those two categories of crime. This forgiveness is defined as "an abdication of someone's right to punishment without resentment and with contentment."[9] The *sulh* process of conciliation provided a way of repairing the ruptures that would come between members of the community from time to time.[10]

The African concept of *ubuntu* recognizes that humanity is intertwined so that what impacts one impacts all. *Ubuntu* is the essence of being human. When the brutal apartheid era in South Africa ended in April 1994, Nelson Mandela and Archbishop Desmond Tutu pushed for a Truth and Reconciliation Commission to unify and heal the country, in part because it was consistent with *ubuntu*. They recognized that persons who had harmed others and those who had been harmed alike would continue living together in post-apartheid South Africa, and that ongoing criminal trials would further divide the nation. In *No Future Without Forgiveness*, Desmond Tutu explains:

> The humanity of the perpetrator of apartheid's atrocities was caught up and bound up in that of the victim whether he liked it or not. In the process of dehumanizing another, in afflicting untold harm and suffering, inexorably the perpetrator was being dehumanized as well.[11]

The traditions of indigenous populations in North America, New Zealand, Australia, and elsewhere also view crime as impacting others in the community. The Lakota Sioux tradition views others within the community as relatives. They exist to care for and to live in right relationship with one another and with the earth so that the community may flourish.[12] Likewise, the Navajo Nation considers all within the clan to be their relatives. The term *k'e* signifies a strong sense of belonging to a clan. When one person hurts, others within the clan hurt too because they are relatives. In his important law review article, *Life Comes From It: Navajo Justice Concepts*, Robert Yazzie, Chief Justice Emeritus of the Navajo Nation, explains this sense of connectedness within the community.

> If I see a hungry person, it does not matter whether I am responsible for the hunger. If someone is injured, it is irrelevant that I did not hurt that person. I have a responsibility, as a Navajo, to treat everyone as if he or she were my relative and therefore to help that hungry person. I am responsible for all my relatives.[13]

In traditional Navajo tort law, restitution is required so "there will be no hard feelings" within the community and persons who have been harmed can be made whole again. However, the compensation amount

is based on the feelings and intuitions of the person harmed and the abilities of the person who caused the harm to pay rather than a transactional calculation based on summing up actual losses.

A BRIEF HISTORY LESSON

For all its traditions, this approach to criminal justice is unfamiliar to most of us today. When we think about criminal justice, we tend to focus on prosecutors, police, and prisons. Cases are called *The People of a State v. Defendant*. Juries are supposedly the made up of defendant's "peers," but most often know jurors nothing about the people who were harmed, the people who caused the harm, or the communities from which they come. How did this transformation take place?

The People Who Are Harmed

As tribal societies in Europe were consolidated into kingdoms under feudal lords, rulers took an increased interest in reducing sources of conflict. The interests of people harmed during those conflicts began to be replaced by the interests of the rulers in their resolutions. For common law jurisdictions, the Norman invasion of Britain marked the turning point in this changing understanding of crime. William the Conqueror and his successors found the legal process an effective tool for establishing the preeminence of the king over the Church in secular matters and in replacing local systems of dispute resolution. The *Leges Henrici Primi*, written early in the twelfth century, asserted royal jurisdiction over offenses such as theft punishable by death, counterfeiting, arson, premeditated assault, robbery, rape, abduction, and "breach of the king's peace given by his hand or writ."[14] Breach of the king's peace gave the royal house an extensive claim to jurisdiction:

> [N]owadays we do not easily conceive how the peace which lawful men ought to keep can be any other than the Queen's or the Commonwealth's. But the King's justice … was at first not ordinary but exceptional, and his power was called to aid only when other means had failed.… Gradually the privileges of the King's house were extended to the precincts of his court, to the army, to the regular meetings of the shire and hundred, and to the great roads. Also, the King might grant special personal protection to his officers and followers; and these two kinds of privilege spread until they coalesced and covered the whole ground.[15]

Thus, the king became the paramount person harmed when offenses occurred, sustaining legally acknowledged (although symbolic) injuries. The actual person harmed was gradually removed from any meaningful place in the justice process. One important way we see this is that reparation for the person harmed (restitution) was replaced with reparation for the king (fines).

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Private and Public Prosecution

Even after Henry I succeeded in redefining crime as an offense against the king instead of the person who was harmed, that person (and to a certain extent, the community) retained a voice in the criminal process through the mechanism of private prosecution. Private prosecution had its roots in medieval England, preceding the Norman Conquest. A private prosecutor managed the entire case (from apprehension through trial) as though it were a civil matter. Although the private citizen (usually the person harmed) was required to bear the financial costs of the prosecution, there were also financial incentives for the successful private prosecutor such as threefold restitution. England, and

some other common law countries, still allow private prosecutions by any persons (including any business or non-governmental organization), regardless of whether they were directly affected by the crime. This is viewed as "a valuable constitutional safeguard against inertia or partiality on the part of authority."[16]

However, during the nineteenth century, British reform advocates such as Jeremy Bentham and Sir Robert Peel began campaigning for the establishment of a public prosecutor. They did not argue for the abolition of private prosecution; in fact, Bentham argued for a system with both public and private prosecution. But private prosecution alone, he believed, was inadequate for crimes that were essentially public in nature. At the same time, he opposed giving the state a monopoly on prosecution because this put too much power in the hands of the government.

There were other complaints about private prosecution as well. At times of high crime, when so much depended on the deterrent ability of the legal system, it was unwise to rely on the willingness of people who had been harmed to prosecute. Private prosecution might be ineptly conducted and result in unnecessary acquittals. It might be motivated by revenge or greed.

This debate in England culminated in the passage of the Prosecution of Offenses Act in 1879, which established the office of the public prosecutor, charged with supervising prosecutions of a limited range of offenses in which the ordinary form of prosecution was seen as insufficient. The remainder of the cases was left to private prosecutors, and the overwhelming number of those prosecutions (some report 80%) was initiated by police officers.[17]

For a long time, historians equated adoption of public prosecution with the elimination of private prosecution. Therefore, they concluded that private actions fell into disuse in the United States shortly after the Revolution. It was historian Allen Steinberg's research into the magistrate's courts in Philadelphia that shed new light on the operation of a hybrid public–private prosecution process lasting until late in the nineteenth century. In his book *The Transformation of Criminal Justice: Philadelphia, 1800–1880*,[18] Steinberg makes a convincing case for the dominance of private prosecution until the 1880s (at least in dealing with the largest numbers of prosecutions—those for relatively minor offenses). The reason for this dominance was the popularity of the magistrate courts, operated in Philadelphia by elected officials known as aldermen who conducted administrative as well as judicial functions.

Although these courts were highly informal in operation, the aldermen/justices had the power to hold defendants in jail pending trial by a court of record, to dispose of certain minor cases, and to require the posting of a peace bond. The aldermen were for the most part unschooled in the law, and they would create new offenses on the spot if it seemed necessary. Poor people, in particular, frequently resorted to aldermen for justice.

It is the popularity of the magistrate's courts that Steinberg finds intriguing, particularly in light of what appear to twenty-first-century lawyers to be significant flaws in how these courts operated. They were crowded, unruly, and undignified. The aldermen created new offenses and made them effective retroactively. Because the aldermen's fees came from the litigants, there was little incentive for them to refuse a prosecution and ample opportunity for corruption. Steinberg concludes that these courts were a form of popular, local, and informal justice. They offered a forum in which disputes could be readily resolved because the disputants controlled what happened. Although there were regular outcries against the courts' abuses, these were raised by reformers, not by those who used the courts.

Eventually, the development of the public police force (combined with the longstanding complaints about abuses of informality) led to a reorganization of the magistrate courts, which effectively ended private prosecution. Philadelphia did not have a police department until 1854. Prior to that time, it relied on a night watch system with only limited police coverage during the day, and the patrol was much more passive than it was proactive. With the advent of the police force, a new possibility emerged for initiating criminal cases, one that could bring greater efficiency to crime fighting, namely, requiring all cases to be initiated by the police or by a public prosecutor based on investigative work

performed by the police. This was viewed as an antidote to the unruliness of the magistrates' courts, as Steinberg described them.

> The central point is that, at bottom, the criminal court was dominated by the very people the criminal law was supposed to control…. The ordinary people of Philadelphia extensively used a system that could also be so oppressive to them because its oppressive features were balanced by the peoples' ability to control much of the course of the criminal justice process. Popular initiation and discretion were the distinctive features of private prosecution, rooted in the offices of the minor judiciary where it began, and remained the most important aspect of the process even in the courts of record. Whether it be to intimidate a friend or neighbor, resolve a private dispute, extort money or other favors, prevent a prosecution against oneself, express feelings of outrage and revenge, protect oneself from another, or simply to pursue and attain a measure of legal justice, an enormous number of nineteenth-century Philadelphians used the criminal courts.[19]

Prisons

In the late 1800s, progressive thinkers in England, such as Henry Fielding, John Howard, and Jeremy Bentham, began calling for segregation of people in prison from their criminogenic environments, much as doctors would quarantine persons with a contagious disease. They proposed a treatment plan for those people that would focus on "correction of the mind."[20] In the United States, like-minded reformers convinced policymakers to implement this rehabilitative model of sentencing. With that model emerged an institution that, although novel at that time, has since become a symbol of the criminal justice system itself—the prison.

> Prior to 1790, prisons were used almost exclusively to hold persons who had been accused of crimes until they were tried or sentenced, or to enforce labor orders.

Prior to 1790, prisons were used almost exclusively to hold persons who had been accused of crimes until they were tried or sentenced or to enforce labor orders while the person worked off debts.[21] Reformers in Philadelphia, aghast at the cruelty of the available punishments and miserable jail conditions, and believing that criminals were the products of bad moral environments, persuaded local officials to turn the Walnut Street Jail into what they optimistically called a "penitentiary," or place of penitence.

How did they arrive at the idea of imprisonment as the vehicle for reform? It appears they drew from the use of confinement in monasteries, which began as early as the fourth century. Initially, confinement was to the monk's room, but over time, special rooms were built to hold those who it was believed needed time for reflection and change.[22]

The 1787 preamble to the constitution of the Philadelphia Society for Alleviating the Miseries of Public Prisons clearly stated that their intention was not only to save people who were in prison from dehumanizing punishment but also to rehabilitate them:

> When we consider that the obligations of benevolence, which are founded on the precepts of the example of the author of Christianity, are not canceled by the follies or crimes of our fellow creatures … it becomes us to extend our compassion to that part of mankind, who are the subjects of these miseries. By the aids of humanity, their undue and illegal sufferings may be prevented … and such degrees and modes of punishment may be discovered and suggested, as may, instead of continuing habits of vice, become the means of restoring our fellow creatures to virtue and happiness.[23]

People sent to this penitentiary were isolated in individual cells, away from the influence of immoral parts of society. They were given a Bible and time to contemplate it and regular visits from the warden

of the prison. Yet, by the early 1800s, prisons were already being denounced as ineffective. "Our state prisons as presently constituted are grand demoralizers of our people," concluded a New York lawyer.[24] This, however, did not discourage prison advocates; if isolation did not achieve the goals of repentance and rehabilitation, then perhaps other measures would work. Succeeding generations of reformers moved from theories of repentance to those of hard work, then of discipline and training, and eventually of medical and psychological causes of crime. Each generation was disappointed as most people in prison proved to be unchanged by their particular model of rehabilitation.

Reformers moved from theories of repentance to hard work, discipline and training, and finally medical and psychological treatment. Each generation was disappointed.

Michael Tonry identified four periods of policy changes in recent criminal sentencing in the United States between 1950 and 2013. During the period from the 1950s to 1975, which he calls the *Indeterminate Sentencing* period, the predominant sentencing value was rehabilitation. This period had features that may sound strange to a contemporary reader. Judges did not set determinate sentences when they sent someone to prison (which itself happened far less often than today). Instead, the judge would set a range of years the person convicted of causing harm might serve for the offense. For example, the judge could announce a prison sentence of "four to twenty-five years." This meant that the person had to be imprisoned for at least the minimum sentence (four years in our example). They could be awarded "good time" by prison officials to reward good behavior and progress toward rehabilitation, which effectively reduced both their maximum and minimum sentences. The person being held had to be released by the time they had served the maximum sentence (in our example, 25 years, minus good time). Additionally, on a regular basis, a parole board considered whether or not the person in prison had become rehabilitated.[25] During this period, the US imprisonment rate (prisoners per 100,000 population) remained relatively stable at 150–160 per 100,000.[26]

The *Sentencing Reform* period ran from 1975 to 1986. These reforms limited the discretion of judges in several ways: By giving them guidelines to use when imposing sentences, requiring them to give a determinate sentence within those guidelines, and giving guidelines to parole boards to limit their discretion in making release decisions. The key sentencing value of this time was that justice must be fair to all regardless of race, economic status, gender, or other status. During this time, the imprisonment rate began to go up rapidly reaching 313 per 100,000 by 1986. Three factors explain this development: More cases going to court, more sentences of imprisonment rather than non-prison sanctions, and longer sentences.[27]

The *Tough on Crime* period was a time of increased mandatory minimum sentences for certain people who seemed to pose a high risk of reoffending, "three strikes laws," life without the possibility of parole, and sexual predator legislation were adopted. There were also expanded opportunities to transfer juvenile offenders to more punitive adult courts. The primary sentencing value driving these changes was the idea that a subset of Americans were incorrigible outlaws who had to be excluded from society. Unsurprisingly, the percentage of people in prison continued to rise to 615 per 100,000 in 2007.[28]

The final period, which Tonry called the *Equilibrium* period, went from 1996 to 2013 (when he wrote his article). He said that while there were many sentencing changes made, it was hard to determine common values in them. Nevertheless, the imprisonment rate continued to rise to a high of 762 in 2007, after which it began to fall.[29] Over the last decade, the incarceration rate has steadily decreased to 551 people per 100,000 by mid-2020 as COVID-19 spread throughout prisons.[30] Even with these decreases, the US incarceration rate far exceeds those of other developed countries.[31] And, the prison system touches many more people's lives than simply those who are currently incarcerated. In 2020, nearly 4.5 million people were under correctional supervision (parole and probation). Nearly 5 million people were formerly incarcerated in state or federal prisons and experienced ongoing "invisible punishment" as discussed

below. Seventy-seven million people had a criminal record, and 113 million adults had immediate family members who have been to prison or jail.[32]

> The US incarceration rate far exceeds those of other developed countries, and the prison system touches many more people's lives than simply those who currently are incarcerated.

It is worth noting, then, that the development of restorative justice came during a time of increasing concern about the human and financial costs of high rates of imprisonment. It also emerged during a time of increased awareness of both the needs of the people harmed and of systemic issues of injustice that affected minority communities in particular. We will return to this later.

Juries

Governmental authority can be increased by drawing together respected community leaders to determine both the applicable customs, norms, and culture concerning a conflict and what a just resolution of the particular conflict might look like. That was one of the reasons for the development in common law countries of the jury as a means of resolving disputes in a community. But the jury was significantly different in the thirteenth century than it is today. Eight hundred years ago, the ideal juror was not someone who was ignorant of the facts or a stranger to the parties. They were selected *because* they knew the parties and knew of the dispute and could therefore decide which party the judgment should favor. Judges, appointed by the king, traveled throughout the country presiding over local cases applying the king's law. Because these circuit judges were outsiders, they summoned respected local people to apply the king's law to the facts so juries reached verdicts that would be accepted. While it was important that jurors not be (and not be viewed as) partial to either party, it was equally important that they be neighbors to the parties. During selection of the members of the jury, either party could object on the grounds that an individual juror was biased against the party or that they did *not* have sufficient local knowledge. In fact, at one time jurors were expected to acquaint themselves with the facts if they had no first-hand knowledge themselves. They sometimes met with the parties so that they could be briefed before the hearing.

> Eight hundred years ago, the ideal juror was not someone who was ignorant of the facts or a stranger to the parties. They were selected *because* they knew the parties and knew of the dispute.

By the fifteenth century, in England, the courts had begun to distinguish between jurors and witnesses. By the eighteenth century, the ideal juror was one who was ignorant of the facts and of the parties. However, it was still assumed that the jury would embody the values, norms, and sense of justice that was held by its community. The community was not presumed to have the same values as the king.

For example, as the United States developed its own legal system, Patrick Henry criticized the drafters of the Constitution for failing to insist that juries should not only be impartial but also should be drawn from the neighborhoods of the parties where the crime had taken place. This was known as "vicinage," meaning that members of a jury should live in the vicinity of the parties. That was because the power of a jury to interpret that law gave it the power to ignore it altogether if the law offended the conscience of the jury. Henry argued that without this protection, English prosecutors could try Americans using juries from England that favored the King and were hostile to American rebels. The Sixth Amendment eventually included this provision:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law….

Jury nullification is the term used when, although a jury knows what the law is, it chooses to ignore the law because they do not like the result. It is generally understood that juries do sometimes decide to ignore an unpopular law. A jury's verdict is inscrutable in that it is made after secret deliberations, so it may not be obvious how it came to the verdict.[33] But if juries have the power to nullify, should judges tell them they have the right to do so? If they use the power without the right, can they be punished?[34] Up to the Civil War, juries were instructed that they were the "judges of both the law and the facts," meaning that they could ignore laws they didn't like.[35]

The populist appeal of nullification was not limited to ancient history or to juries. Prosecutors have on occasion declined to file charges when the circumstances led them to decide it would be unjust to proceed. When this happens, it may be perceived as a denial of justice to some in the community, while others may view it as upholding larger demands of justice. Because these decisions are generally made privately and out of public view, whether or not they are accepted by members of the community depends on their trust in the prosecutor. Recently, some candidates for local prosecutor have campaigned on explicit nullification grounds that if elected, they would no longer prosecute certain classes of offenses such as prostitution or possession of small amounts of drugs. Neither would they sanction certain crimes differently than other similar crimes (e.g., crack and powdered cocaine). The purpose is to remedy what those candidates view as an inequity based on class or racial status.[36] W. Kerrell Murray argues that when such candidates are elected, they should be able to treat their election as public support for such nullification, provided certain conditions have been met.[37]

CURRENT PATTERN OF THINKING: JUSTICE IS IMPARTIAL AND IMPERSONAL

The idea of a "criminal justice system" got its start in 1967 in the United States Commission on Law Enforcement and Administration of Justice's final report, "The Challenge of Crime in a Free Society."[38] Calling it a *system* suggests that we should be able to follow a single input (a particular crime, in this instance) and watch a series of coordinated interventions from policing to courts to probation, prisons, and parole. We may then observe the contributions of each to the resulting output, which could be an acquitted defendant or a rehabilitated person, or even a person found guilty who completes a long prison term. The report not only used systems terminology but also provided a flowchart which sought to diagram all the parts of the criminal justice system and how they relate to each other.[39]

The idea of a "criminal justice system" got its start in 1967, leading to a view of crime and justice that values impartiality and impersonality above all else.

But these developments have led to a view of crime and justice that values impartiality and impersonality above all else. Most of the important elements of the ancient, relational understanding of justice have been exchanged for processes defended on the basis of impartiality. Persons who have been harmed find themselves reduced to witnesses at most, while prosecutors defend their management of criminal cases based on objectives of efficiency and fairness to people who caused the harm. Meanwhile, their protections are viewed as obstacles to getting a conviction, providing them with incentives to deny the accusations. The community is not welcomed into the criminal justice system in any significant way and is generally uninvolved, unless something causes outrage which is outside the criminal justice system.

Mass Incarceration

In the current pattern of thinking, incarceration in jail or prison is the normative approach to punishing people convicted of crimes. The government's reliance on a criminal justice policy based on incarceration is relatively recent, and it has had enormous consequences.

As we noted earlier, the prison population began its steady increase in 1974, but events during the mid-1960s pointed toward the punitive criminal justice policies to come. It was during the height of the civil rights movement. Crime began to increase in big cities and anger simmered within Black urban communities. Tensions boiled over and riots erupted in Watts (August 1965), Newark (July 1967), Detroit (July 1967), Chicago (April 1968, following Martin Luther King Jr.'s assassination), and in other US cities. Excessive police force often sparked the riots, and households across America watched scenes of violence and destruction unfold on their televisions. America seemed at war with itself.

In 1968, President Lyndon B. Johnson formed what became known as the Kerner Commission to uncover the reasons behind the urban strife. While the Commission recognized the problem's complexity, its final report stated that "certain fundamental matters are clear…. [w]hite racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II."[40]

The Commission recommended that the government invest in Black communities so they might have better opportunities in education, employment, and housing. It emphasized that "the need is not so much to design new programs as it is for the Nation to generate new will." The Commission urged communities to come together and carry out this positive vision. "Private enterprise, labor unions, the churches, the foundations, the universities—all our urban institutions—must deepen their involvement in the life of the city and their commitment to its revival and welfare."[41]

A few weeks before President Johnson formed the Kerner Commission, he had signed legislation that strengthened law enforcement in hopes to ease the tension within urban communities. That law, rather than the Commission's recommendations, set the tone for the government's response to urban unrest, and from that point on, criminal justice policy became increasingly punitive. Then, in 1974, the consensus that prisons could become places of rehabilitation began to crumble as well, with the title of an article by Robert Martinson summing up the new perspective: "Nothing Works."[42] Although he later retracted that categorical denunciation of the possibility of rehabilitation, the message had gone out: Incarceration is for punishment and for society's protection.

War on Drugs and Its Consequences

The incarceration rate exploded in the 1980s and 1990s and coincided with the "War on Drugs." In fact, drug offense convictions were a key driver for the dramatic increase in the prison population.[43] The "crack" cocaine trade and gang activity overtook public spaces in poor urban communities and kept people inside their homes. People and businesses that could afford it moved away from these city centers. Violent crime increased and police ratcheted up control in these communities. Nationally, drug policies started favoring punishment over treatment. Police concentrated on controlling crime, especially drug crimes, within inner cities, and the problem was linked to one demographic group, namely young Black men. In 1980, approximately 41,000 people were in prison for drug offenses. In the mid-2000s, that number reached nearly a half-million people.[44] In 2020, the number had reduced to 330,000, but still represented an increase of 700% from 1980.[45]

Law enforcement and the rhetoric around it became increasingly militarized. Police appeared to be more like occupying forces than peace officers in poor urban communities. In the late 1980s, state and local law enforcement agencies received federal funding, military equipment, and special training. Special Weapons and Tactics (SWAT) teams were formed in cities across the country. Paramilitary-style narcotic operations increased from a few hundred in the early 1970s to 40,000 in 2001, as police units raided homes, apartment buildings, public housing projects, and even high schools.[46]

This punitive, battle-like response to crime disempowers poor urban communities and contributes toward their deterioration. High concentrations of policing and incarceration have had a negative ripple effect that touches nearly every family within these communities. It impacts the children whose parents are incarcerated and whole families. The effect spreads outward and impacts the quality of life and safety across the entire community.

The punitive, battle-like response to crime disempowers poor urban communities and contributes toward their deterioration.

In *The New Jim Crow: Mass Incarceration in an Age of Colorblindness*, Michelle Alexander discusses the long-term consequences of imprisonment.[47] People who have been released from prison experience ongoing, invisible punishment as they return to their communities. Legal restrictions make it difficult for them to re-integrate. They are barred by law from public housing, and private landlords discriminate against them. Often, they are required to inform potential employers they have a criminal record, and laws deny them opportunities to obtain professional licenses. They are often ineligible for food stamps and other public benefits and may be denied their right to vote or sit on juries.[48] Alexander says that the growing amount of research simply reflects common sense:

> [B]y locking up millions of people out of the mainstream legal economy, by making it difficult or impossible for people to find housing or feed themselves, and by destroying familial bonds by warehousing millions for minor crimes, we make crime more—not less—likely in the most vulnerable communities.[49]

Alexander's voice echoes a common theme among voices across the political spectrum, albeit for different reasons: The criminal justice policies that led to mass incarceration are widely regarded as failures, due for change.

In his essay, *The Effects of High Imprisonment Rates on Communities*, criminologist Todd Clear identifies four main points reflected in literature about high incarceration rates within communities.[50]

- *Incarceration is concentrated in disadvantaged communities, especially communities of color.* Incarceration is a dominant characteristic in a small number of impoverished urban communities.
- *High incarceration rates within impoverished communities tend to negatively affect people who are incarcerated and the community as a whole.* It impacts social relationships, social networks, mental and emotional health, and the ability to obtain or keep employment.
- *The negative effects of high incarceration rates within communities probably decrease public safety.* As the negative side effects of incarceration expand, evidence suggests that it leads to more crime within communities.
- *No proven strategy exists for combatting these negative effects on communities.* Solutions need to come from changes in penal philosophy and sentencing laws.

Clear also examined research that studies the effects of incarceration on families, and while not straightforward, he states that on balance it is a net negative.

> Most of the men who ended up behind bars engaged in behavior that created strains on the family. When they were arrested and ended up cycling through prison or jail, some of that strain was lessened. But, at the same time, a new set of strains came along. Families struggled financially to deal with court costs and later the need to provide support for people who were locked

up. Parenting with someone behind bars is an emotional and practical strain. A host of destabilizing consequences—housing changes, school maladaptations, welfare problems, and strains on relationships—follow the person's trip to the prison.[51]

CONSIDER AN ALTERNATIVE

Our purpose here is not to suggest that criminal justice in the past was primarily good, and in the present, it is primarily bad. Some commentators have suggested that restorative justice proponents use history selectively, offering a partial and misleading account of the past in an effort to legitimize restorative justice.[52] This is certainly not our intention. The systems that included restitution, that gave an important status to the needs of people who have been harmed, and that sought to repair broken relationships within communities, also had other elements that were nothing like restorative justice. For example, powerful members of indigenous societies often received different treatment when compared to those who were poor and powerless. The human rights of women and children were not respected in ways that would meet the expectations of contemporary cultures.

Nevertheless, we have provided this short historical review to show that the values and processes with which we are familiar in contemporary criminal justice are not absolutes. Just because they are familiar to us now does not mean that they have always been embraced. We believe that it is possible to unknowingly operate within a pattern of thinking that prevents consideration of alternatives. The following chapters offer the opportunity to consider a new pattern of thinking.

We've presented a historical look at potentially restorative approaches in the past in an appeal to the reader to suspend any immediate judgment that this book presents strange, untested, and never-before-conceived ideas. Introduction of those values and processes into contemporary criminal justice requires care and perseverance; it will not be easy. In the final section, we suggest some ways this might be done. But, in this chapter, we're simply asking the reader not to discount the ideas and processes of restorative justice because they seem unfamiliar or impractical.

CONCLUSION

Our impersonal, antiseptic understanding of justice and crime has very little similarity to the ancient, deeply relational, pattern of thinking found in concepts like *ubuntu*, *shalom*, and *k'e*.[53] These held that a community's response to crime should be to help people harmed recover and to reestablish constructive relationships within the community. The ancient pattern assumed that families and communities were responsible for the behavior of their members who had harmed others, or had been harmed, by wrong behavior. As they were denied places in the justice process, power and control shifted almost entirely into the government's hands. Government interests now take priority over all other interests.

The results of this transition from a relational view of justice to an impersonal one, from informal justice processes for persons harmed, persons who caused harm, and their communities, to the government relying increasingly on apprehension and punishment, has neither solved the crime problem nor returned people to the community who are better prepared to be law-abiding.[54] People serving time in prison are released from overcrowded and expensive prisons with their human dignity deeply violated and are subjected to continual shame each time their past is revealed.[55] And communities live in fear because of the threat of crime.[56] We propose that restorative justice is a preferable alternative to the status quo. In the next chapter, we discuss how restorative justice has developed.

REVIEW QUESTIONS

1. Why are patterns of thinking relevant to the discussion of criminal justice?
2. The ancient pattern of thinking assumed that persons who harmed others and their families should help restore community peace by making amends. What does the contemporary criminal justice pattern assume?
3. What changes did the shift from the ancient to the contemporary approach bring about for persons who are harmed? For persons who cause harm? For communities?

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2

THE DEVELOPMENT OF A NEW PATTERN OF THINKING

Key Concepts

- History of the term, "restorative justice"
- Reform efforts that contributed to restorative justice
- Developers of restorative justice ideas and processes

In this chapter, we will offer a kind of "patchwork history" of restorative justice by focusing on particular topics. First, where did the term *restorative justice* come from and why, despite the problems with the name, has it caught on? Second, whose critiques and initial soundings on the topic became early attempts to articulate the vision and theory of restorative justice? Third, who were some of the early explorers of restorative justice?

THE TERM "RESTORATIVE JUSTICE"

The first use of the term "restorative justice" in the context of criminal justice was by Albert Eglash in several 1958 articles in which he suggested that there are three types of criminal justice: (1) Retributive justice, based on punishment; (2) Distributive justice, based on therapeutic treatment of persons responsible for harm; and (3) Restorative justice, based on what he called "creative restitution."[1] Ann Skelton (2005) traced Eglash's source for the term restorative justice to a 1955 book, *The Biblical Doctrine of Justice and Law*, originally published in German, then translated and adapted further into English.[2] The term "restorative justice" does not appear in the German version of the book, but was used in the English translation as a substitute for "healing justice." Eglash received a copy of the book and became interested in both the concept of restorative justice (albeit with less interest in the theological discussion in that book) and in creative restitution. Both punishment and treatment models, he noted, focus on the actions of the persons responsible for harm. They deny participation of people harmed by crime in the justice process and require merely passive participation by the person responsible for the harm. Restorative justice, on the other hand, focuses on the harmful effects of their actions and actively involves the people harmed and the persons responsible for harm in the process of reparation and rehabilitation.

As we will see in Chapter 3, people do not necessarily mean the same thing when they speak of restorative justice or describe particular programs or interventions as restorative. Skelton noted that

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Howard Zehr, who is frequently credited with calling this approach "restorative justice" in the late 1980s, had read an anthology published in 1978 with a reprint of one of Eglash's 1958 articles. She discovered that Zehr had made marginal notes in his copy of Eglash's chapter, suggesting that he possibly became aware of the term "restorative justice" from reading Eglash's work. (Zehr himself is uncertain where he first heard of the name, and if it was from Eglash, he meant something quite different from Eglash's creative restitution).

These definitional differences are due in part to the diverse critiques and reform efforts that contributed to restorative justice theory. Furthermore, each description may be partial, like those of blindfolded people explaining what elephants are like based on the part they happen to be touching—the trunk, the leg, or the tail. Stauffer and Shah undertook a research project to identify persons using the term "restorative justice" to describe their work. They found at least four groups of people, namely "(i) those in indigenous and aboriginal settings, (ii) those in community-based organizations or activist settings, (iii) those in schools and educational environments, and (iv) those working with or in legal/criminal systems and institutions."[3] Each group has its own preferred definition.

The field of restorative justice has developed in piecemeal fashion, over time, and in different areas of the world.

Jonathan Burnside and Nicola Baker used the term *relational justice*, highlighting the importance of crime's relational (and not simply its legal) dimensions.[4] Marlene Young proposed *restorative community justice* to stress both the importance of community involvement and the value and potency of community action in crime prevention.[5] Still others have used the term *transformative justice* to emphasize that underlying and systemic injustices must be exposed and resolved before we can say that justice has been done.

The field of restorative justice has developed in piecemeal fashion, over time, and in different areas of the world. Some processes now considered core to restorative justice developed independently of restorative thinking. They have since been embraced as restorative, and they have influenced and been influenced by efforts to conceptualize restorative theory. Furthermore, some proponents have advocated, based on restorative justice reasoning, for inclusion of programs such as victim and witness assistance programs, community policing, and problem-solving courts. Thus, before considering the definition of restorative justice, it might be useful to sketch out a history of its development and growth. We begin by looking at the writings of people who influenced early restorative justice theory.

ATTEMPTS TO REFORM CONTEMPORARY CRIMINAL JUSTICE

Contemporary criminal justice policy is built on the partial truth that crime involves lawbreaking and is a wrong against the public. The name given to criminal cases (*State v. Defendant*) makes this clear. The flaw is that it ignores three critical aspects of criminal justice. First, the needs of the persons who are harmed must be considered, so a comprehensive response must expand to address those harms. Second, the harm to the government is a technical, legal harm; it is certainly different in kind from the experience of the persons harmed, the community, and even persons responsible for harm. Third, crime challenges the values of the community. While the impersonal justice meted out by the government may be defended as more efficient, it often fails to protect the values of the communities

it is supposed to serve.[6] As a result, the government's primary response to crime has become increasingly punitive and risk averse. This has contributed to mass incarceration and the deterioration of impoverished communities.

What other responses might there be? During the past 60 years, a variety of alternatives have emerged. Some initially appear to be unrelated, but taken together, they underscore that the problem is one of how we think about crime and justice. These include movements for the rights of people harmed, prison abolition, civil rights and social justice, and indigenous and informal justice.

In this section, we identify three alternative responses to criminal lawbreaking that point to what have become core restorative justice principles. First, a just response will meet the needs of people harmed by crime; second, a just response will include communities, especially those most impacted by the crime; and third, a just response will reduce incarceration and shift resources to community-based efforts that rehabilitate persons responsible for harm.

A Response to Crime that Meets the Needs of People Harmed

The contemporary re-emphasis on the unmet needs of people harmed by crime came from the concerted efforts of individuals and groups who were frustrated and angry that these needs were disregarded by a system preoccupied with criminal suspects. The reform efforts have focused on three broad thrusts—increasing services to the people harmed, increasing the likelihood of their receiving financial reimbursement for the harm done, and asserting their rights to information and involvement during the course of the criminal justice process.

Advocacy for the rights of people harmed has focused on providing help, restitution or compensation, information, and involvement during the criminal justice process.

Reform Efforts Focused on Increasing Access to Services

In *The Crime Victim's Book*,[7] Morton Bard and Dawn Sangrey addressed the range of needs that people harmed confront, giving practical suggestions for how those might be met. They offered advice not only for those people but also for their families and for those who might assist them. This fueled a movement to provide support to people harmed by crime. Albert Roberts' subsequent survey of service for people harmed in the United States discovered that the programs that had been established were most likely to be affiliated with law enforcement and funded by grants. He described and evaluated these programs in his book, *Helping Crime Victims*.[8]

Reform Efforts Focused on Ensuring Restitution or Compensation

Beginning in the 1960s, people began exploring ways that reimbursing persons harmed could be a sensible criminal justice sanction. The arguments favoring this approach were that their harm was generally direct and easily identified, that restitution could be rehabilitative and less restrictive or intrusive sanction for persons responsible for harm, and that it might reduce the public's desire for more retributive sanctions. While evaluations conducted in the 1970s and 1980s left unanswered questions about whether restitution programs had actually met those expectations, the requirement of restitution orders has increased.

Reform Efforts Focused on Procedural Rights

William McDonald's edited collection of articles, *Criminal Justice and the Victim*,[9] provided a comprehensive survey of the opportunities for, and the barriers to, participation by the person harmed in the prosecution and sentencing of the suspect. Beginning with their decision to call the police and concluding with issues related to correctional policy, McDonald and colleagues described the alienating effects on people harmed by a system focused on the needs and duties of those responsible for harm.

A Response to Crime that Includes the Community

In late spring 2020, in Minnesota, police officer Derek Chauvin pressed his knee into George Floyd's neck for 9:29 minutes. Floyd's death sparked nationwide protests against police brutality, particularly as it became clear that this was not an unusual response by police to people of color. Because Chauvin's conduct was video recorded by a bystander, people in America and around the world could observe what people of color had known through experience for many decades: The interests, values, and concerns of people of color are not adequately reflected in contemporary criminal justice policies and practices. The slogan "Black Lives Matter" did not mean that no other lives mattered. It meant that Black lives matter as much as anyone else's lives, and that this must be asserted because the police do not always act that way. Some added to this the demand that police funding needed to be reallocated in ways that reflect the community's perspectives on what they need in order to thrive.[10]

In making these calls, protesters joined others from as far back as the early 1970s who had campaigned against the government's monopoly over criminal justice, arguing that the parties themselves, and their communities, should be given a greater voice. The informal justice and prison abolition movements developed in the 1970s with the recognition by legal anthropologists that in virtually all societies, justice is pursued using both formal and informal proceedings. When legal systems confront a growing crisis of confidence in the legitimacy of the formal structures, informal alternatives with "an emphasis on (a) increased participation, (b) more access to law, (c) deprofessionalization, decentralization, and delegalization, and (d) the minimization of stigmatization and coercion" should be used.[11] One of the leading proponents of informal justice was Jerold S. Auerbach, whose *Justice without Law?* argued for deprofessionalizing the justice system.[12]

> Recent protesters, as those in the 1970s, are against the government's monopoly over criminal justice and for giving the parties and their communities a greater voice.

Nils Christie, a Norwegian criminologist and sociologist, also advocated de-professionalizing criminal justice and engaging and empowering communities to resolve their own conflicts. In a 1977 article "Conflict as Property," Christie suggested that conflict is not in fact something to be "solved" but something to be *owned*. The very existence of the criminal justice system, from this perspective, reflects a theft by the government of their conflict from the person harmed and the person responsible for the harm. This represents a real and a serious loss:

> This loss is first and foremost a loss in *opportunities for norm-clarification*. It is a loss of pedagogical possibilities. It is a loss of opportunities for a continuous discussion of what represents the law of the land. How wrong was the thief; how right was the person harmed?[13]

A Response to Crime that Reduces Incarceration

In his subsequent book on punishment, *Limits to Pain*, Christie drew a connection between this "theft" and the use of punishment. In criminal law, values are clarified by graduated punishment. "The state establishes its scale, the rank-order of values, through variation in the number of blows administered to the criminal, or through the number of months or years taken away from him." Rather than being made clear through conversation among the participants—the rightful "owners" of the conflict—values are communicated by the state through the infliction of pain. He proposed participatory justice as a better response to crime, a response characterized by direct communication between the owners of the conflict leading to compensation.

Similarly, when prison abolitionists advocate for closing prisons, they want communities to be empowered to hold greater responsibility for preventing crime, maintaining community safety, and rehabilitating and integrating people responsible for harm and people who have done time. According to the Marshall Project, contemporary abolitionists have two primary goals:

> The first is devolving responsibility for public safety to local communities…. [Second,] to redistribute government spending from police and prisons to narrowing the underlying, crime-breeding inequalities of wealth and opportunity. They would instead invest in housing, education, jobs and health.[14]

M. Kay Harris called for a fundamental restructuring of criminal justice to reflect feminist values—"that all people have equal value as human beings, that harmony and felicity are more important than power and possession, and that the personal is the political"—in place of the values of control and punishment.[15] She suggested that preoccupation with rights blinds parties to the need for a caring and interdependent response. Recognition of the broader dimensions of justice would increase awareness of the need and opportunity for participation by all parties in order to address the needs of all.[16]

These criticisms were a response to the US government's war on drugs and crime (discussed in Chapter 1) that started in the late 1970s and intensified in the 1980s and 1990s with skyrocketing incarceration rates. People of color were disproportionately impacted by these supposedly "race neutral" policies. Ninety percent of people who were incarcerated in some states were people of color.[17] Of course, incarceration's impact extends beyond the time individuals spend in prison and continue long after they are released.

The US government's war on drugs and crime brought skyrocketing incarceration rates. People of color were disproportionately impacted by these policies.

Some proponents of abolition have called for prisons to be done away with completely. Others seek to decrease the use of prisons dramatically. Still others campaign for a moratorium on construction of new prisons. In place of prisons, they suggest that restitution, compensation, and reconciliation programs be established in local communities so that the response to crime can be decentralized. Early abolitionists took inspiration from Jerome Miller, who became head of the Massachusetts Department of Youth Services in 1969. He promptly began shutting down the state's youth facilities, replacing them with community-based programs. By the time he left his position three years later, there were essentially no custodial facilities remaining for young people in the state.

Some of the leading abolitionists included a small group of scholars who became known as the "Utrecht School" because of their affiliation with Utrecht University in The Netherlands, Herman Bianchi and Louk Hulsman, also Dutch; Thomas Mathiesen of Norway; Fay Honey Knopp of the United States; and Ruth Morris of Canada. Key organizations offered leadership for periods of time

before being succeeded by others. An early example was the Unitarian Universalist Service Committee's National Moratorium on Prison Construction, which was active during the 1970s and into the 1980s. Ruth Morris and others organized the first International Conference on Prison Abolition in 1983, a conference that has been repeated every two years to the present.

Gerald Austin McHugh's book, *Christian Faith and Criminal Justice*,[18] argued that penal models in America grew out of a medieval Christian view of sin and punishment, but that this was not the only relevant motif inherent in the Christian faith, which also affirms values of mercy, relationship, restoration, forgiveness, reconciliation, and hope. He suggested that such values, if applied to criminal justice policy, would result in very different structures and processes from those now in place. Similar biblical reflection has been offered by members of the Mennonite tradition in North America, resulting in a wealth of literature and programs on alternatives to current approaches.

In 1980, drawing from his experience as a prisoner and then as an advocate of volunteer involvement within the correctional environment, former Watergate co-conspirator Charles Colson believed that criminal justice must underscore personal responsibility. While not a prison abolitionist, Colson argued that restitution should be used instead of imprisonment for people responsible for harm who do not pose a danger to society.[19]

Indigenous Justice Approaches

Indigenous justice approaches reflect the principles inherent in all three responses: Those that meet the needs of the person harmed, empower the community to handle conflict, and offer alternatives to address harm other than an adversarial approach that operates on the threat of incarceration. Indigenous peoples in many countries live on the margins of their societies but are over-represented in the criminal justice system. Many of these communities once had their own conflict resolution practices they used in the aftermath of crime. These customary, traditional, or indigenous approaches to justice were used prior to or alongside Western criminal justice systems introduced by colonizers. Because indigenous practices had been used in less complex and highly relational settings, some have been adopted by restorative justice practitioners as alternatives to criminal or juvenile justice practices. Conferencing and circles (described in Chapter 3) have their roots in indigenous practices. Conferencing was adapted from practices of the Māori people in New Zealand and circles from the traditions of First Nations people in Canada.

> Many communities once had their own customary, traditional, or indigenous approaches to justice prior to or alongside Western criminal justice systems.

All these efforts and approaches provide essential insights that flow into and enrich a restorative theory of justice both in its early development and continuing today.

EARLY EXPLORERS OF RESTORATIVE JUSTICE THEORY

In previous editions of this book, we called Howard Zehr the "grandfather" of restorative justice.[20] He was the first person to articulate a coherent theory of restorative justice in his ground-breaking book, *Changing Lenses: A New Focus for Crime and Justice*, published in 1990.[21] Zehr suggested that the current criminal justice "lens," based on retribution, views crime as lawbreaking and justice as allocating blame and punishment. He contrasted that with restorative justice, which views crime as a violation of people and relationships, which, in turn, leads to obligations to "make things right" and views justice as a process in which all parties search for reparative, reconciling, and reassuring solutions.[22]

Others were exploring similar ideas in other geographical and social contexts. Martin Wright's prolific and important work contributed to the development of restorative justice thinking and practice, particularly in Europe. In his 1991 book, *Justice for Victims and Offenders*, he drew from his experiences as an advocate for people harmed and for prison reform to argue that criminal justice should be restorative rather than retributive.[23] Wright argued that the present exclusion of people harmed from the system could be remedied by expanding compensation, restitution, and mediation processes to permit greater participation by both people harmed and people responsible for harm. He suggested that such a model might be constructed by creating two governmental departments. The first, responsible for crime prevention, would emphasize deterrence through enforcement rather than deterrence through punishment. The second department would be responsible for a just response to crimes when they do occur. This would include support for people who were harmed, mediation, and reparation as well as courts that emphasize restitution payments to them.[24]

In 1992, Virginia Mackey wrote an evocative "discussion paper" on restorative justice for the Criminal Justice Program of the Presbyterian Church (USA).[25] This document was intended to facilitate conversation within that faith community on the problems of current approaches to crime and on biblically reflective alternatives. Using Fay Honey Knopp's terminology, Mackey proposed a "Community Safety/Restorative Model" predicated on six principles: (1) That safety should be the primary consideration for the community, (2) that persons responsible for harm should be held responsible and accountable for their behavior and the resulting harm, (3) that people and communities harmed by crime need restoration, (4) that the underlying conflicts that led to the harm should be resolved if possible, (5) that there must be a continuum of service or treatment options available, and (6) that there must be a coordinated and cooperative system in place that incorporates both public and private resources.[26]

With the publication of Wesley Cragg's, *The Practice of Punishment* that same year, the discussion of restorative justice took a more conceptual turn.[27] Cragg, a philosopher and a long-time volunteer with a prisoner advocacy and prison reform organization, revisited foundational theoretical positions on the role and use of punishment. He criticized traditional justifications but insisted on the importance of formal processes in which conflict can be resolved. These formal processes, however, should provide within their frameworks the opportunity for informal resolution and acceptance of responsibility by persons responsible for harm. Formal justice, in his view, need not be antithetical to virtues such as forgiveness, compassion, mercy, and understanding; what was antithetical in his view was an insistence on punishment, the sole justification of which is to cause suffering.[28]

Others have also attempted to find theoretical frameworks within which to understand and analyze restorative justice. "Reintegrative shaming" is the term John Braithwaite used in 1989 for his theories concerning the causes and consequences of crime, but it was not until a family group conferencing program was organized in Wagga Wagga, New South Wales, Australia, that reintegrative shaming and restorative justice became linked.[29] In 1993, David Moore proposed that the work of Silvan Tomkins and Donald Nathanson may offer a "psychology of reintegrative shaming" and reflected on this approach to crime and reintegration from the perspective of moral psychology, moral philosophy, and political theory.[30] Moore concluded that reintegrative shaming offered a framework for theoretical analysis and evaluation of conferencing programs.

In a 1993 exchange in the journal *Criminal Law Forum*, Daniel Van Ness and Andrew Ashworth debated the case for restorative justice and the role of people harmed in the criminal justice process.[31] In his article, Van Ness suggested that there was a historical basis for questioning the criminal–civil separation in Western legal systems and for establishing criminal justice objectives that aimed at addressing the harms experienced by all stakeholders. Ashworth warned that it is important to distinguish between the needs of people harmed for assistance and any rights that they might have in criminal courts. He also cautioned about attempting to accomplish larger criminal justice goals through sentencing policy.

An attempt to root restorative concepts within a larger framework was offered in a 1994 book edited by Jonathan Burnside and Nicola Baker titled, *Relational Justice*.[32] Noting the decline in the quality of relationships in Western cultures, these authors considered whether "relationalism" might offer an antidote to problems plaguing criminal justice. Although not specifically referring to restorative justice theory, contributors presented "victim–offender mediation" and "family group conferences" as examples of relational justice, and they suggested ways the activities of police, probation, and prison authorities might be evaluated by their capacity to strengthen relationships.

Although a number of writers have noted in passing that restorative justice principles may have relevance to crime prevention, one of the more comprehensive proposals on that aspect of criminal justice policy was offered by Marlene A. Young, then Executive Director of the US-based National Organization for Victim Assistance, in her 1995 paper, *Restorative Community Justice: A Call to Action*.[33] After defining restorative community justice, she reviewed a series of program elements that might constitute a model of such a system, including community policing, community prosecution, community courts, and community corrections. The first, community policing, involves police officers actively building strong community bonds within the neighborhoods in which they function. The other three are similar. Community prosecution involves a shift from reactive prosecution to proactive problem-solving within the community; community courts increase the level of participation of the person harmed and the community during adjudication; and community corrections offer communities and people harmed meaningful ways of participating in the correctional process.

CONCLUSION

The restorative justice movement is over 40 years old now. The term has been defined and applied in criminal justice in several different ways. The goal of all is to address the harm done through wrongdoing in a way that respects, actively includes, and benefits the people harmed, those who caused the harm, and other stakeholders. Practices to provide more restorative approaches than contemporary criminal justice have been developed across the globe. Appendix 2 illustrates this. Of note in virtually every region of the world are efforts by activists and program providers working with representatives of indigenous peoples to develop and promote restorative practices. But although many jurisdictions have instituted legislation supporting restorative justice and its practices, their use often remains limited due to barriers within the system and lack of funding.

> The goal of restorative justice is to address the harm done through wrongdoing in a way that respects, actively includes, and benefits the parties and other stakeholders.

So, what does it all mean, especially to those who are directly affected by crimes? In the beginning of Chapter 1, we shared the story of Justice Kelly, who has argued that a purpose of the law should be to heal the wounds caused by crime, and that criminal law practitioners should view themselves as healers.

In this chapter, we have given a broad overview of movements that advocate for responses to crime and wrongdoing that meet the needs of people harmed, give power and resources back to the community to "own" its conflict, and to offer alternatives that bring healing outside the criminal justice system. We close this chapter with a story from New Zealand exemplifying a community-based model that offers a contemporary alternative to the old pattern of thinking, as told by Sir Kim Workman, a leading reform advocate there.[34]

> In Rotorua in the summer of 1987, I was visited by the police, concerned that a Māori man living in a local village had committed incest with his daughter. The 15-year-old woman had reported the matter to her teacher but had subsequently retracted the claim.

> [The matter was dealt with according to Māori custom.] Within a week, village elders had called a meeting on a Friday evening. About 40 people attended. They included the suspect and his family, their extended family (aunts, uncles, cousins), community elders, and representatives of each of the village families. Once gathered, they sat around the inner walls of the meeting house and began reciting prayers.
>
> At the completion of prayer, the elders repeated the police allegation and asked the suspect if it was true. He immediately admitted guilt—a response common with the older Māori generation, who value truthfulness highly, and consider a person who does not take responsibility for his actions a coward.
>
> Following his confession, each family member was given the opportunity to speak. The young woman spoke of her confusion—of feeling worthless and a chattel, but also of her love for her father, and the fear that he might do the same to her younger sister. The mother spoke out about her duty to protect her husband, and how she knew what was happening, but dealt with that shame through denial. The 13-year-old younger sister spoke of her mixed feelings of fear and love. The father responded by acknowledging that he had done wrong and expressing remorse for his behavior. Family members spoke directly to the person responsible for the harm, venting their anger and making clear the shame that he had brought on the wider family. The women comforted the young woman and her sister, and one woman shared her own experience of having been harmed by incest.
>
> The following day, the elders agreed that the person responsible for harm should lose his status as an elder and speaking rights at the meeting house. He was also forbidden to visit it when young people were present. Then, after much discussion, it was agreed that he would no longer sleep in the family home, but in a shed at the back of the house.
>
> The person responsible for harm accepted the decisions, and there was public reconciliation between him and his family. I learnt later that he faithfully observed the conditions set by the elders for the next three years. Once his youngest daughter left home to work in the city, a ceremony was held at the meeting house where he was accepted back and had his speaking rights reinstated. He resumed living with his wife and, from then on, was treated as a law-abiding and responsible member of the community.

Workman describes a community-based response to sexual harm that is different from the healing response that Justice Kelly espoused. Both responses arguably have a common home within restorative justice. Both have questionable elements as well. In the next chapter, we will define restorative justice, its principles, and the values that undergird its implementation.

REVIEW QUESTIONS

1. Where did the term *restorative justice* come from?
2. What were the various attempts to reform contemporary criminal justice, and what were their goals?
3. Who were early "explorers" of restorative justice theory, and what did they contribute?
4. What is the goal of restorative justice?

NOTES

1. Albert Eglash, "Beyond Restitution: Creative Restitution," in *Restitution in Criminal Justice*, ed. Joe Hudson and Burt Galaway (Lexington, MA: DC Heath, 1977), 92. But Eglash developed his ideas of creative restitution nearly 20 years earlier in a series of articles published in 1958 and 1959 (see Select Bibliography: Eglash 1958a, 1958b, 1958c; Eglash 1959–60). One of the articles was adapted for inclusion in Heinz-Horst Schrey, Hans Hermann Walz, and W. A. Whitehouse, *The*

Biblical Doctrine of Justice and Law (London: SCM Press, 1955), including the following discussion of restorative justice (pp. 182–183):

> This aligning of justice and love is something which it is the peculiar task of Christian believers to promote, and in doing so they need to see beyond the secular conception of justice in its threefold form of distributive, commutative and retributive justice. Justice also has a restorative element. It is perhaps misleading to picture a fourth element which can be added at will to the other three. Walther Schönfeld (Ueber die Gerechtigkeit, 1952) has suggested an alternative picture in terms of dimensions. He maintains that justice as the world knows it in its public life is three-dimensional, in the way just indicated; but that a four-dimensional justice, or perhaps a fourth dimension of justice, is disclosed to the Church, but hidden from the world, in Jesus Christ. The effect of this four-dimensional vision is to produce an inner transformation of the three-dimensional structure; to provide a new total view of man in community; and to uncover possibilities which are simply not there in terms of three-dimensional vision.… Restorative justice alone can do what law as such can never do: It can heal the fundamental wound from which all mankind suffers and which turns the best human justice constantly into injustice, the wound of sin. Distributive justice can never take us beyond the norm of reparation; commutative justice can provide only due compensation; retributive justice has no means of repairing the damage save by punishment and expiation. Restorative justice, as it is revealed in the Bible, alone has positive power for overcoming sin.

2. Ann Skelton, "The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice" (LLD diss., University of Pretoria, 2005).
3. Carl Stauffer and Sonya Shah, "Introduction: Restorative Justice, Taking the Pulse of a Movement," in *Listening to the Movement: Essays on New Growth and New Challenges in Restorative Justice*, ed. Ted Lewis and Carl Stauffer (Eugene, OR: Cascade Books, 2021).
4. Jonathan Burnside and Nicola Baker, eds., *Relational Justice: Repairing the Breach* (Winchester, UK: Waterside Press, 1994). This name was drawn from the "Relational Movement," defined in Michael Schluter and David Lee, *The R Factor* (London: Hodder & Stoughton, 1993).
5. Marlene A. Young, *Restorative Community Justice: A Call to Action* (Washington, DC: National Organization for Victim Assistance, 1995).
6. John Hagan, "Why Is There So Little Criminal Justice Theory? Neglected Macro- and Micro-Level Links Between Organization and Power," *Journal of Research in Crime and Delinquency* 16, no. 2 (1989): 116–135.
7. Morton Bard and Dawn Sangrey, *The Crime Victim's Book*, 2nd ed. (Secaucus, NJ: Citadel Press, 1986).
8. Albert R. Roberts, *Helping Crime Victims: Research, Policy, and Practice* (Newbury Park, CA: Sage, 1990).
9. William F. McDonald, ed., *Criminal Justice and the Victim* (Beverly Hills, CA: Sage, 1976).
10. For one clear definition, see Rayshawn Ray, "What Does 'Defund the Police' Mean and Does It Have Merit?" *Brookings*, June 19, 2020. https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/
11. Roger Matthews, "Reassessing Informal Justice," in *Informal Justice?* (Newbury Park, CA: Sage, 1988).
12. Jerold S. Auerbach, *Justice without Law?* (New York: Oxford University Press, 1983).
13. Nils Christie, "Conflict as Property," *British Journal of Criminology* 17, no. 2 (1977): 8.
14. Bill Keller, "What Do Abolitionists Really Want?" *The Marshall Project*, June 13, 2019, https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want/.
15. M. Kay Harris, "Moving into the New Millennium: Toward a Feminist Vision of Justice," *The Prison Journal* 67, no. 2 (1987): 27–38. Kathleen Daly and Julie Stubbs observe that feminist thought concerning alternative justice approaches has changed over time. See Kathleen Daly and Julie Stubbs, "Feminist Theory, Feminist and Anti-Racist Politics, and Restorative Justice" in *Handbook of Restorative Justice,* ed. Gerry Johnstone and Daniel W. Van Ness (Portland, OR: Willan, 2007), 152–155.

16. At the beginning of the millennium, a movement of abolition feminists they termed "transformative justice" grew from the broader feminist antiviolence movement because they were concerned about the overreliance of the criminal justice system to address gender-violence. The movement advocated for a community-based approach termed to address violence and increase community safety without relying on the criminal justice system or other state systems. See Johonna Turner, "Creating Safety for Ourselves," in *Colorizing Restorative Justice: Voicing Our Realities,* ed. Edward C. Valandra, Waŋbli Wapȟáha Hokšíla (St. Paul, MN: Living Justice Press, 2020).
17. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 10th anniversary ed. (New York: The New Press, 2020), 73.
18. Gerald A. McHugh, *Christian Faith and Criminal Justice: Toward A Christian Response to Crime and Punishment* (New York: Paulist Press, 1978).
19. Aaron Griffith, *God's Law and Order: The Politics of Punishment in Evangelical America* (Cambridge, MA: Harvard University Press, 2020), 218–259.
20. Daniel W. Van Ness and Karen Heetderks Strong, *Restoring Justice: An Introduction to Restorative Justice*, 1st ed. (Cincinnati, OH: Anderson Publishing, 1997), 26. In our first edition, we chose to call Zehr the "grandfather" of restorative justice (rather than "father") because at that time there were many different and sometimes competing versions of the subject. With passage of time, however, it has become clear that Zehr's influence has been profound and vital within the movement, such that he could properly be called the "father" of restorative justice.
21. Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottdale, PA: Herald Press, 1990).
22. Zehr, *Changing Lenses*.
23. Martin Wright, *Justice for Victims and Offenders* (Philadelphia: Open University Press, 1991).
24. Wright, *Justice for Victims and Offenders*, 114–117.
25. Virginia Mackey, *Restorative Justice: Toward Nonviolence* (Louisville, KY: Presbyterian Justice Program, 1992).
26. Mackey, *Restorative Justice*, 41–42.
27. Wesley Cragg, *The Practice of Punishment: Towards a Theory of Restorative Justice* (New York: Routledge, 1992).
28. Cragg, *The Practice of Punishment*, 213–216.
29. See, for example, John Braithwaite, *Crime, Shame and Reintegration* (New York: Cambridge University Press, 1989). See Chapter 7 for more about reintegrative shaming.
30. David Moore, "Evaluating Family Group Conferences," in *Criminal Justice Planning and Coordination: Proceedings of a Conference Held 19–21 April 1993*, ed. David Biles and Sandra McKillop (Canberra: Australian Institute of Criminology, 1994). See also David Moore, "Shame, Forgiveness, and Juvenile Justice," *Criminal Justice Ethics* (Winter/Spring 1993): 3.
31. Daniel W. Van Ness, "New Wine in Old Wineskins: Four Challenges of Restorative Justice," *Criminal Law Forum* 4, no. 2 (1993): 251–276. Andrew Ashworth, "Some Doubts About Restorative Justice," *Criminal Law Forum* 4, no. 2 (1993): 277–299.
32. Burnside and Baker, eds. *Relational Justice.*
33. Young, *Restorative Community Justice*.
34. Sir Robert Kinsela (Kim) Workman KNZM QSO gave us his unpublished paper with a longer version of this story. This edited story, "Journey Towards Justice," is used with the author's permission.

3

JUSTICE THAT PROMOTES HEALING

Key Concepts

- Three Conceptions of Restorative Justice: Encounter, Reparative, and Transformative
- Definition and Principles of Restorative Justice
- Values of Restorative Justice
- Outcomes of Restorative Justice

What is restorative justice? It can seem that there are as many answers as people who may be asked. Some definitions focus on the elements of restorative processes. Others begin with the idea touched on in the first paragraphs of Chapter 1—that crime causes harm and justice should promote healing. Others build on restorative values such as respect for others. Still others suggest that restorative justice is a holistic approach to life and to relationships, one that has far-reaching effects beyond simply the issue of crime or rule breaking.

THREE CONCEPTIONS OF RESTORATIVE JUSTICE: ENCOUNTER, REPARATIVE, AND TRANSFORMATIVE

Johnstone and Van Ness[1] have suggested that one explanation for the difficulty in arriving at a single definition is that restorative justice is a *deeply contested concept*.[2] That is, it is a complex idea, the meaning of which continues to evolve with new discoveries. It is also a positive term, meaning that it is considered a good thing to have the name applied to a program or idea. In that sense, it is like the words "democracy" and "justice"; people generally understand what they mean, but they may not be able to agree on a precise definition.

A difficulty in arriving at a single, precise definition of restorative justice is that it is a complex idea, the meaning of which continues to evolve with new discoveries.

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It does seem possible, however, according to Johnstone and Van Ness, to identify three basic conceptions that proposed definitions of restorative justice typically center around. The first is the ***encounter*** conception. This focuses on the importance of stakeholder meetings and on the many benefits that come as stakeholders discuss the crime, what contributed to it, and its aftermath. It helps identify one of the key differences between restorative processes and criminal justice processes. In restorative processes, the person harmed, the person causing harm, and other interested parties are free to speak and to decide what to do in a relatively informal environment, and through that come to terms with what happened. In court, on the other hand, the active participants are generally professionals who have only a detached connection to the crime and to those who were touched by it. Decisions are not made by the parties but, rather, by the judge. Whereas the defendant generally has a lawyer, the person harmed does not; instead, their interests are considered to be identical with society's interests, represented by the prosecutor. The encounter conception would not consider something restorative if it did not involve the stakeholders affected by the crime meeting together in some way.

The second is the ***reparative*** conception. "Crime causes harm; justice must repair that harm." The harm exists at many levels, as we will see, and it can often be addressed most fully when the parties meet in a restorative process to explore and respond to the needs that arose from the crime. However, this conception is not limited by the ability or willingness of the parties to meet. If they are unable or unwilling to participate, this conception would insist that court proceedings focus on identifying and taking steps to repair the harm caused by the crime. A process or outcome would not be described as restorative if it did not provide some sort of redress to people directly harmed, and, perhaps, communities and those who caused the harm as well.

The third is the ***transformative*** conception. This is far more expansive than the other two because it addresses not simply individual instances of harm but extends to structural issues of injustice such as racism, sexism, and classism. Each of these injustices prevents people from living in whole, harmonious, and healthy relationships with others and with their social and physical environments. Restorative justice therefore becomes a way of life because it addresses all our relationships, and it offers a way in which broken relationships can be repaired (often through challenging existing societal injustices). In this way, it has the potential to transform social structures as well as individual relationships. This conception would not describe something as restorative if it did not address structural impediments to equitable and healthy relationships, communities, and systems.

These conceptions are closely related, and they often interconnect and overlap with one another within a restorative justice paradigm. They represent a journey toward well-being and wholeness that people harmed, the people causing harm, and community members might experience—*encounter* leads to *repair* and repair leads to *transformation*.

RESTORATIVE JUSTICE DEFINITIONS

Restorative justice definitions flow from these three conceptions and anchor how restorative justice processes operate. In his highly influential book, *Changing Lenses*, Zehr described restorative justice in this way. "[Restorative] justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance."[3] This is an *encounter* definition in which the parties decide how to repair the harm and thereby may experience transformation.

Two other influential early definitions came from England. Tony Marshall, like Zehr, emphasized the importance of stakeholder encounters. He described restorative justice as "a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future."[4] Martin Wright, on the other hand, proposed a *reparative* definition while recognizing the importance of stakeholders meeting.

> [The] response to crime would be, not to add to the harm caused by imposing further harm on the offender, but to do as much as possible to restore the situation. The community offers aid to the

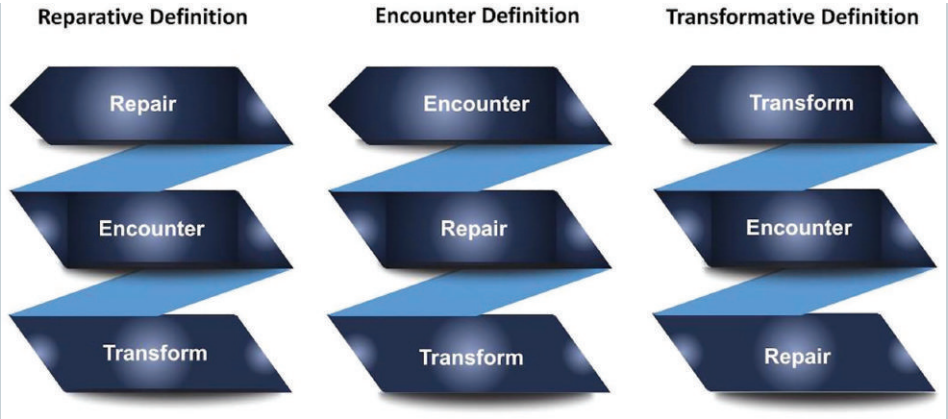
victim; the offender is held accountable and required to make reparation. Attention would be given not only to the outcome, but also to evolving a process that respected the feelings and humanity of both the victim and the offender.[5]

Additionally, some have chosen to use an alternative name to describe what others call restorative justice. Ruth Morris spoke of "*transformative* justice," emphasizing that crime is not simply a violation of people and relationships but that it also offers an opportunity for a systemic transformation of conditions in society that cause crime and decrease safety.[6] At the beginning of the millennium, a movement of abolition feminists grew from the broader feminist antiviolence movement. They advocated for a community-based approach that they also termed "transformative justice" to address violence and increase community safety without relying on the criminal justice or other state systems.[7]

Definitions of restorative justice might be distinguished by which of the three conceptions (reparative, encounter, or transformative) is viewed as most essential.

Definitions of restorative justice might be distinguished by which of the three conceptions is viewed as most essential. Figure 3.1 shows how each definition reflects a ranking of the importance of each of the three conceptions.

Figure 3.1 Encounter, Reparative, and Transformative definitions



Those who adopt the **reparative definition** tend to emphasize a priority for repair, particularly when the parties come together to agree on how it will be achieved, but also when a restorative encounter cannot take place.

Those who use the **encounter definition**, on the other hand, tend to emphasize the essential importance for the parties to come together to talk about how to repair the damage left by crime, believing that this creates an environment that potentially transforms the parties' attitudes and beliefs. Or, to put it another way, restorative justice can promote conditions that achieve a degree of healing.

The **transformative definition**, alternatively, takes a more expansive view of what gets transformed. Here it is society itself. As the community begins to assume responsibility for pursuing peace, making it possible for the government to relinquish its coercive control, people harmed and those who cause harm will be freer to interact. As a result, the person who caused harm may be more willing to accept responsibility and take steps to repair the harm, and perhaps, the person harmed may be more able to offer forgiveness. The benefits extend beyond the immediate parties, reinforcing transformative strengths in the community and society around them as well.

Our Definition

We suggest the following as a definition of restorative justice:

Restorative justice is a theory of justice that prioritizes repairing the harm caused or revealed by criminal behavior. It is best accomplished through cooperative processes that include all stakeholders. This may result in transformed people and structures.

Our understanding of restorative justice falls within the reparative conception discussed above, with one important proviso: Repair is most fully accomplished when it results from an *encounter* of the parties. There is a practical benefit to this definition. When the circumstances are not ideal for a fully restorative process (such as when one or more parties are unwilling or unavailable to participate in an encounter), then other options may be considered (e.g., using "surrogates" in an encounter or by judges when they sentence people convicted of crime to pay restitution).

We believe that restorative justice with a reparative focus is the most practical approach when seeking to reform the contemporary justice system with governmental cooperation. But we acknowledge that this is different from the views of proponents who argue that the contemporary criminal justice system itself is so oppressive that no element can be retained. These advocates seek community-based justice alternatives and will actively resist the state-sponsored criminal justice system, so long as it reflects oppressive values.

Restorative justice envisions a world where harms and injustices are handled in ways that bring about healthier communities, personal and social well-being, and right relationships with one another. What are the principles and values that anchor and guide the decisions and practices to contribute to the fulfillment of this vision?

RESTORATIVE JUSTICE PRINCIPLES

From the three conceptions of restorative justice—reparative, encounter, and transformative—flow the basic principles that govern implementation of restorative justice in processes and in systemic reform. First, restorative justice prioritizes repairing harm caused by crime. This requires that we meet the primary stakeholder needs, especially the needs of the person directly harmed by crime, hold those who caused harm accountable to make amends, and address underlying issues that contributed to the crime.

Second, restorative justice includes the primary stakeholders impacted by crime, namely the person harmed, the person causing harm, and affected community members. These stakeholders should have opportunities for active involvement in the justice process as early and as fully as they choose.

Third, community members help build peace and well-being within the community. When crime occurs in the midst of the community or to its members, a critical role it can play is to support the people harmed and, as they reintegrate into the community, the persons who caused harm. The government helps maintain order and keeps the community safe.

Let's consider each of these in turn.

Principle 1: Justice Heals

Justice requires that we work to heal the people harmed by crime, those who caused the harm and their communities.

Virtually every facet of our contemporary criminal justice system works to make passive participants of people harmed, the people who caused harm, and community members. The needs of people harmed are peripheral to the justice process because the government is considered the primary harmed party. Agents of the government have a virtual monopoly over the apprehension, prosecution, and punishment of

people who commit crimes. Because the people harmed are not parties of interest in criminal cases, but simply "piece[s] of evidence to be used by the state to obtain a conviction,"[8] they have very limited control over what occurs and have no responsibility to initiate particular phases of the process.

Similarly, defendants have few incentives to actively participate in the justice process and take responsibility for harm they caused. Because of the legal presumption of innocence bestowed on all who are charged with crimes as well as the panoply of due process rights that are afforded them, often they remain passive while the government marshals its case, and their lawyers attempt to dismantle it. Often, defense lawyers urge them to stay silent to avoid saying something that harms their case or could be used against them during current or future criminal proceedings.

Finally, the direct participation of community members is also limited, consisting almost exclusively of service on juries or as witnesses. Family members and others closely connected to the persons harmed or persons accused of causing harm have no meaningful opportunities to express how the crime impacted them. The contemporary criminal justice system gives no space to understand the extent, if any, systemic injustice might have contributed to the crime, or to set expectations for family or community members to hold those who caused harm accountable for repairing harm from the crime, and to support the persons harmed during their recovery. No opportunity exists to empower community members to support either or both as they recover and reintegrate into the community in the crime's aftermath.

Principle 2: Justice Includes

The people harmed, those causing the harm, and their communities should have the opportunity for active involvement in the justice process as early and as fully as they wish.

Crime leaves people who were harmed, communities, and those who caused harm in its wake, each affected in different ways and experiencing correspondingly different needs. Restorative justice looks at repairing harm from a broader perspective than the binary relationship between the person harmed and the person who caused the harm common within contemporary criminal justice systems. To promote healing, restorative justice must respond appropriately, considering the needs and responsibilities of each stakeholder.

Because of the varying circumstances of people harmed, similar injuries may produce substantially different levels of harms. But as Justice Kelly discovered, because victimization is also the experience of being wronged by another, it brings with it the need for vindication, that is, an authoritative and decisive denunciation of the wrong and exoneration of the one who was wronged.

In this respect, the persons who caused harm have the primary responsibility to meet the needs of the persons they harmed. They need to acknowledge and take responsibility for the harm, at least to some extent, before participating in restorative justice processes. They should be held accountable to make amends to those harmed by their criminal behavior. When persons who cause harm acknowledge responsibility for a crime, or at least do not deny responsibility,[9] restorative justice processes can focus on how the parties might move forward in the crime's aftermath. This way, the persons harmed can recover and heal as much as possible, and those who caused harm can make right the wrong and grow from the experience.

Finally, restorative justice processes remain incomplete without addressing underlying issues that might have contributed to the crime. Because the primary stakeholders come into restorative justice encounters in a cooperative posture, they are more likely to share openly about circumstances surrounding the crime. This space for dialogue is important. Often, the people harmed want answers to questions about the crime and why it occurred so they can make sense of what happened, regain control of their lives, and attain emotional closure. They may need to talk about the traumatic impact of the crime and circumstances that may make them fearful of future harm. When the persons who caused harm share about their background, their struggles, and the context in which the crime occurred, without making excuses, it helps answer the

questions of the person harmed. It also helps reveal the unmet needs of those who cause harm which, if resolved, might aid in their rehabilitation and prevent future crime. At a broader level, it gives deeper insight into systemic or community-wide issues that foster crime.

Principle 3: Justice Shares

We must rethink the relative roles and responsibilities of government and community: In promoting justice, the government is responsible for preserving a just order and the community for establishing a just peace.

The term *order* is sometimes used as though it were a synonym for public safety; politicians speak, for example, of the need for "law and order" as a means of ending "crime in our streets." Safety, however, is a broader, more inclusive concept than order. Both order and peace are means of securing public safety. In keeping with ancient Jewish law that drew on the idea of "shalom," we propose that the pursuit of "peace" is a cooperative dynamic fostered from within a community.

Safety is a broader, more inclusive concept than order. Both order and peace are means of securing public safety.

Communities that foster peace are concerned about people and relationships within the community. They are likely to invest in its members and cultivate a strong sense of belonging within the community and connection with one another. There is likely to be equal concern about all members, including the most disadvantaged. Equal opportunities and support will likely exist for all to grow and flourish. Faith-based institutions, schools, businesses, and community-based groups help build peace-filled communities. In fact, these groups and entities are smaller communities themselves. Ideally, they cultivate a similar sense of belonging among their members, while remaining connected with the wider community.

Peace requires a community's commitment to respect the rights of its members and to help resolve conflicts among them. Peace-filled communities are actively engaged and address sources of conflict before it endangers others or risks serious harm. When conflict or harm occurs, they are concerned about meeting the needs of those involved, primarily of the people harmed and those who caused harm. Healthy communities have the capacity to resolve conflict without involving law enforcement or government officials. They support the harmed people and help them access services needed for their recovery. They hold the people who caused harm accountable to repair harm directly to the people most impacted. If they are punished or separated from the community, when they return the community welcomes them back, provides support, and helps them reintegrate within the community.

Peace requires that members respect community interests even when they differ from their individual interests. It is in this context that communities and their members assume responsibility for addressing the underlying social, economic, and moral factors that contribute to conflict within the community. To have sustained peace, the community needs to actively identify and address these underlying factors that create or contribute toward the conditions that lead to conflict.

On the other hand, the government is responsible for maintaining order within the community. They have legitimate interests to promote public safety and enforce rights, freedoms and protections defined in the law meant to establish free and safe communities. Through the law, the government establishes and enforces external limits on individual behavior to minimize overt conflict and to control the resolution of conflict. There are, of course, other reasons why the government might use force, including to protect and advance its own interests, and they may use the word "order" to justify repressive action. This is not what we mean by "order."

At their best, laws define a community's values, and each person should have protection under the law, regardless of their race, ethnicity, gender, religion, political position, or status in society. When community members follow laws that reflect their common values, this points to a healthy community.

The government also is obligated to provide due process protections when an individual's fundamental rights are limited or taken away, such as when a person is sanctioned for violating criminal law. The government should also fix maximum punishment ranges so outcomes from criminal proceedings are uniform, neither too harsh nor too lenient, compared to outcomes from other similar cases and contexts.

Unlike the community's concern for peace and relationships, the government may be concerned more about whether people obey the law than addressing the underlying conditions that lead to crime and more about punishing behavior as a consequence for breaking the law than repairing harm or reconciling relationships. Like peace, a just order may be important in establishing a safe community, and governments generally have both the power and the mandate to establish such an order, but order alone will not be enough.

When crime and wrongdoing occur, the response requires both government and community intervention. Each plays different roles. On one side of the continuum, the government takes authoritative and unilateral steps to take charge. Professionals—police, probation officers, lawyers, and judges—arrest and establish the guilt of defendants and determine how they will be punished, often through imprisonment. Persons directly harmed by crime and others in the community have minimal roles or opportunities to participate in the justice process or have their harm redressed.

On the other side of the continuum, the community seeks to build peace and forge a sense of belonging that not only protects against crime but also creates conditions where people within the community, especially the most vulnerable and marginalized, grow and flourish in their individual and collective capacities. The community also gains greater control to address crime and other harms that occur in ways that meet the needs of the parties involved and addresses underlying issues that contributed toward the crime.

Whereas a government-dominated justice model relies on professionals who are emotionally detached from cases, community-based justice models rely on formal and informal networks of voluntary and paid community members. While local, informal justice processes can take any number of forms, the key criterion would be how to give stakeholders of crime the most restorative response possible to repair the harm caused by crime. Community-based responses also need to resolve the conflict and repair the resulting harm, even exploring the root causes that contributed to the wrongdoing, with all their complexities.

Nils Christie has argued that if communities own their conflicts, the people most impacted tend to engage one another and decide how to resolve them. But this does not mean that they will necessarily operate from a restorative pattern of thinking. Local, informal justice processes can be just as punitive, indeed even more punitive, as the government-controlled criminal justice system. People who have power and influence tend to default to coercive, punitive thought and behavior toward those who have less power.

The criminal justice system's punitive focus is not an incidental result of the choices made in the legal history we explored in the first chapter. In the United States, the urge to punish reflects deeply ingrained social values. So, while community-controlled justice processes may offer greater potential to reflect restorative values discussed in this book, without adequate oversight, and process accountability, they can become punitive reflections of the biases, values, and interests of people who hold power within local communities (think, e.g., of how Jim Crow laws replaced the institution of slavery in the South to preserve the power of White people over Black people).

Any transition to a restorative system will require the government to relinquish power, so communities can take responsibility for their own safety and well-being.

We argue that any transition to a restorative system will require the government to relinquish power so communities can take responsibility and make decisions for their own safety and well-being. The needle needs to move from the government-controlled side of the continuum toward the community-controlled side, keeping in mind the need for public order and the real capacity communities have to respond to crime and repair harm.

Describing peace as the community's responsibility and order as government's should not blind us to the difficult and important complexities involved. Each plays a role in achieving peace and order, as we see when community members form Neighborhood Watch programs to prevent crime, when law enforcement uses community policing strategies, or when government programs address economic and social injustices that inhibit peace. We emphasize a point that is often forgotten in the debate about crime and criminal justice, namely that safety comes as both government and community play their parts in upholding order and establishing peace.

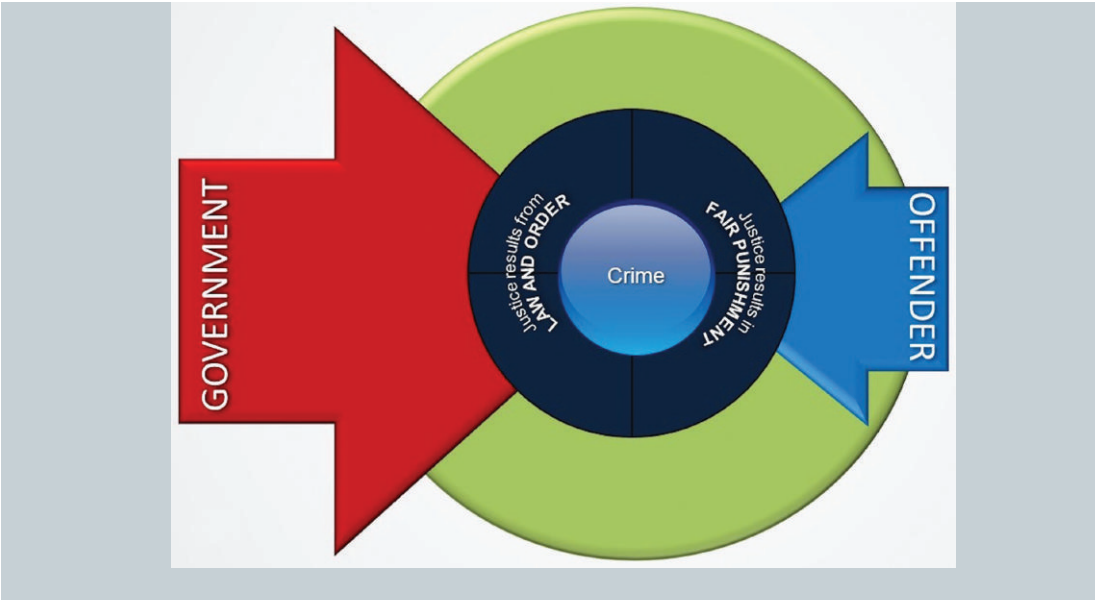
RESTORATIVE JUSTICE: A VISUAL MODEL

We can illustrate how these principles work by using a series of figures to illustrate some of the key features of restorative justice theory. Let us begin by looking at what happens currently when someone causes harm to another (Figure 3.2).

The government seeks to establish law and order by punishing those who violate the law, who are referred to as criminals or offenders because their chief status is as lawbreaker. The government will try to employ sanctions that either deter or rehabilitate them. Because the government's power is great, due process safeguards have developed over the centuries in an attempt to create a fair criminal justice process for offenders. Criminal courts have become arenas of battle in which the government is pitted against offenders in a high-stakes contest to determine whether the law has been violated and, if so, what form of sanctions should be imposed, while the defense seeks a fair process. The offender's accountability is limited to facing punishment imposed by the government.

Because the government's interests extend beyond the individual person who has caused harm, to other potential offenders who may be deterred by what happens to that person, the government's

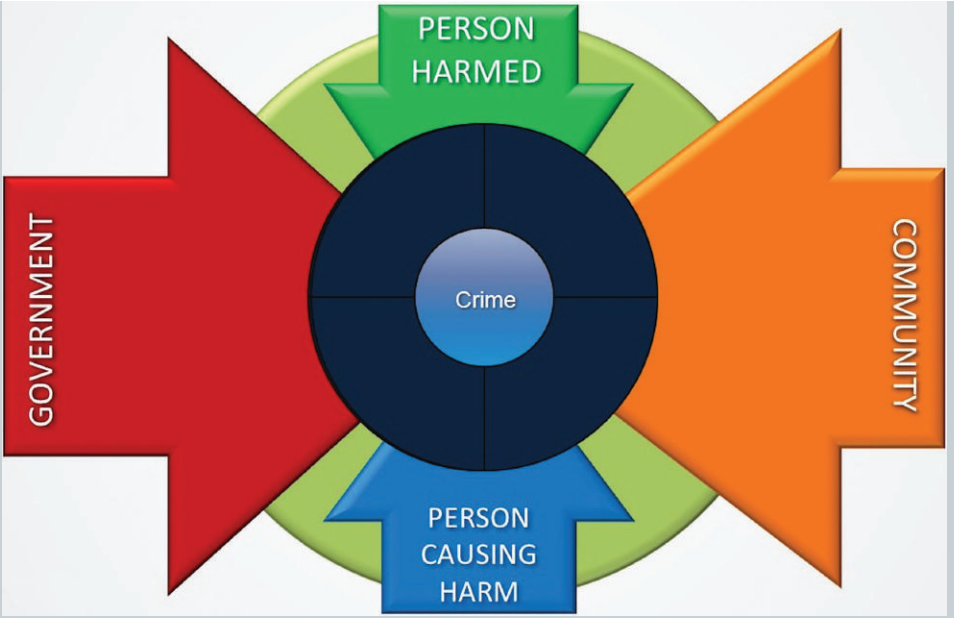
FIGURE 3.2 Government versus Offender in criminal justice



arrow is depicted as larger than the offender's. The size differential reminds us of the overwhelming power of the government when compared to individuals.

Figure 3.3 moves from what exists now to the roles that restorative justice theory suggests should be played by the stakeholders. One of the obvious differences is that the person harmed and the community are added as parties. This reflects the perspective of the ancient pattern of thinking as well as that of restorative justice. The relationship between the four parties should be understood as normative under restorative justice. That is, it portrays what should be, not what is.

Figure 3.3 Four parties in restorative justice

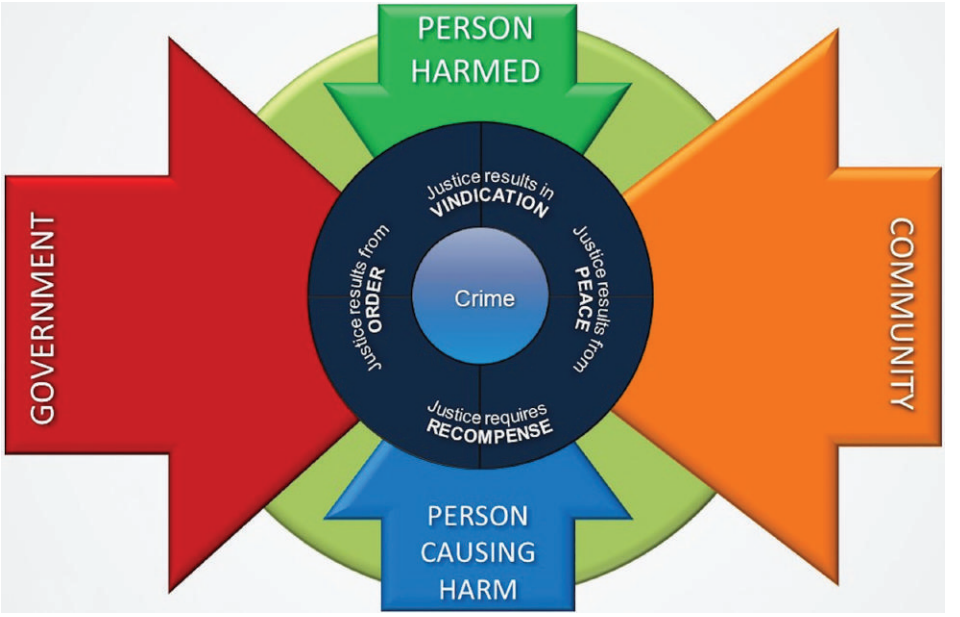


Because of their informal networks and processes for communicating values, communities develop unique cultures. The government adopts policies that help implement and structure those community values. Restorative justice values congruity between those values and the policies to implement them. So, where there is more imposed governmental order, community freedom will be externally limited to achieve safety and to assert the authority of the government. On the other hand, where there is more community peace, less imposed, governmental order will be required. This dynamic relationship between government order and community peacebuilding is the basis for all crime prevention strategies.

In Figure 3.4, we can also see the basic interests of each of the four parties. Every crime involves specific people who have caused harm and those who were harmed, and a goal of justice should be for people harmed to be vindicated. In Justice Kelly's words, they should understand that the crime was not their fault. But in addition, the harm should be repaired. The person causing harm should take major responsibility in this recompense by making amends and by becoming a contributing member of their community (with the help of the community). This will help the government and community provide public safety through increasing and decreasing amounts of order and of relational peace.

Under restorative justice theory, the relationships among the parties are dynamic and dependent. Peace without order is as incomplete as repair without vindication. A society cannot select certain features of the model and omit others; all are essential. That very comprehensiveness is a fundamental aspect of the restorative pattern of thinking about crime.

Figure 3.4 All four parties and their interests



Restorative justice theory seeks to address and balance the rights, needs, and responsibilities of the people harmed, those who harmed them, communities, and the government.

RESTORATIVE JUSTICE VALUES

The processes identified with restorative justice—victim–offender mediation, conferencing, circles, and so forth—will not produce restoration unless they are used according to the principles and values of restorative justice. For example, a program that operates solely during the working day to accommodate the schedule of the paid facilitator is unlikely to be effective in engaging people harmed who work or have other responsibilities during the daytime. Similarly, a facilitator who does not have a good understanding of the cultural norms of one of the participants, or of the power imbalances that exist between them, may fail to take steps to ensure that the person is able to participate effectively. A restorative process may be guided by values that are destructive rather than restorative, such as when the participants focus on excusing the wrongdoer or, at the other end of the spectrum, on humiliating that person.

The processes identified with restorative justice will not produce restoration unless they are used according to the principles and values of restorative justice.

These problems may be confronted in several ways. One is to provide guidelines for practitioners, followed by best practices, and then standards for use in accreditation processes. An alternative is to focus on restorative principles and values in designing and evaluating programs and in training and guiding practitioners.

Each of these approaches has advantages and they are not mutually exclusive. Standards should reflect values; guidelines should be based on best practices. The first three are specific to particular programs and justice systems, but values are less dependent on context. As a result, there has been growing interest in using values to measure and maintain the restorative character of interventions.