1. INTRODUCTION

In the past four decades, we have seen an unprecedented rise in violence, a drastic deterioration of community fabric, and a growing sense of personal danger, which breeds fear, isolation, and estrangement. As spectators to this vast social change, we watch more and more people get incarcerated for longer periods of time. We watch as crime victims retreat from their former full involvement in meaningful activities. We watch impoverished neighborhoods become home to feuding gangs and drug dealing.¹

These conditions leave us feeling overwhelmed and powerless, eventually promoting an apathetic attitude. It seems that there is little we can do to change things. Indeed, we are encouraged to rely heavily on external systems of control such as the police or to live in more secluded and protected communities. However, our predominant dependency on external systems has resulted in an overreliance on punishment to deter crime, physical separation to ensure safety, and surveillance to monitor danger and seems to have made little progress, if any, in solving the levels of crime and violence. Yet we persist in doing more of the same, fearful that if we stopped, circumstances might get worse.

While the increase in socially toxic conditions creates a generalized fear mentality, reactionary policies of protection, and broadly based punitive responses, there is a philosophically different and demonstrably effective approach to crime and violence that is becoming a groundswell. In contrast to current negative trends, this approach generates hope, meaning, and healing through processes of seeking justice and personal accountability. Such an approach tends us towards restorative justice.²

Restorative justice is a fast-growing state, national, and international social movement that seeks to bring people together to address the harm caused by crime, through empowerment of those involved.\(^3\) This important social reform has been developing alongside mounting social problems, escalating rates of incarceration, and the evidence that punishment-oriented policies are not very effective.\(^4\)

Restorative justice views violence, community decline, and fear-based responses as indicators of broken relationships. It offers a different response, namely the use of restorative solutions to repair the harm related to conflict, crime, and victimization.\(^5\) In a very short time, restorative justice has grown from a relatively beginning ideology into a generative force that impacts the way we understand and respond to crime and conflict in diverse communities throughout the world.\(^6\)

Restorative justice is also gaining the increased attention of scholars throughout the world. It has established a rapidly expanding database from studies abroad that examine the processes and outcomes of restorative justice policies and practices.\(^7\) Restorative justice has also been increasingly applied to individual, community, and national healing in response to massive human rights violations, including countries in South America, Africa, the United Kingdom, and the Middle East.\(^8\)

\(^3\) Ibid.
\(^4\) Supra note 1 at 15.
\(^6\) Ibid.
2. DEVELOPMENT OF “RESTORATIVE JUSTICE”

Five influential thinkers are associated with the development of restorative justice: Albert Eglash, Randy Barnett, Nils Christie, Howard Zehr and John Braithwaite. All say that conventional criminal justice is inadequate and accomplishes little for victims or offenders.

(i) ALBERT EGLASH (1950-1977)

The introduction of the term “restorative justice” is credited to Albert Eglash. An academic psychologist based in the Midwest and then in Maryland, Eglash was actively involved in programs for youth offenders and adult prisoners. He drew from these experiences in outlining a “creative” meaning of restitution, comparing it to a conventional meaning, in several articles written in the late 1950s.9

“Creative restitution” aims to be constructive, varied depending on context, offender self-determined but guided, and related to constructive acts for a victim or others. Eglash distinguished the “first mile” of the return of property under court order or by the expectations of friends and family from the “second mile” of restitution “in its broad meaning of a complete restoration of goodwill and harmony.” Creative restitution requires that a situation be left better than before an offense was committed.10

Eglash assumed that restitution should be “life-long” and a “form of psychological exercise” that would encourage human relationships and “ease stigma.” Eglash during 1950s reflects on whether restitution is the correct term, when “restoration, redeeming, or redemption” may be preferable. He elects to “use restitution in a broader sense,” and to “use reparations or indemnity for the narrower term of mandatory financial statement.” The term “restorative justice” does not appear in his articles written during 1950s.11

10 Ibid.
**Conventional & Creative Restitution from Albert Eglash (1950s)**

<table>
<thead>
<tr>
<th>S.No.</th>
<th>Element</th>
<th>Conventional Restitution</th>
<th>Creative Restitution</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Restitution Defined</td>
<td>Synonym for reparations or indemnity</td>
<td>Distinguished from reparations or indemnity</td>
</tr>
<tr>
<td>2.</td>
<td>Four elements compared</td>
<td>• Financial obligation</td>
<td>• Constructive act</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Extent is limited</td>
<td>• Creative and unlimited</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Court-determined</td>
<td>• Guided, self-determined behavior</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Individual act</td>
<td>• Can have a group basis</td>
</tr>
<tr>
<td>3.</td>
<td>Relationship of Restitution to Punishment</td>
<td>❖ Individual pays debt to society: financial only</td>
<td>❖ Individual carries out &quot;constructive, redeeming act&quot; to the victim or others.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>❖ Determined by legal officials, &quot;first mile&quot; is punishment.</td>
<td>❖ Offender participates, goes a &quot;second mile&quot; beyond what the court requires on others aspects.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>❖ Individual only: &quot;In punishment, an offender stands alone.&quot;</td>
<td>❖ Group of offenders can discuss and participate in restitution acts.</td>
</tr>
</tbody>
</table>

Nearly two decades later Eglash (1977) explicitly used the term “restorative justice.” He defined it as the “technique of creative restitution” contrasting it to retributive and distributive justice, which use techniques of punishment and treatment, respectively. Creative restitution is also called “guided restitution” in which an offender is required to make amends for an offense, “but is free to determine what form this amends will take.” The elements of the “restitution act” are an “active, effortful role” which is constructive and directed toward the victim, and related to the damage or harm resulting from the offense.12

Eglash again includes “the second mile” by saying that creative restitution goes “beyond coercion into a creative act” by leaving a situation better than before. He says that creative or guided restitution “fits best as a requirement of probation” but gives no indication of how it relates to other sentence elements. He concludes by saying he is “offender oriented” “seldom thinks about the victim” and has “never visited any victim” and it never occurred to him to ask victims what they thought of creative restitution. Rather, his proposal is concerned with offenders, and “any benefit to victims is a bonus…..”13

However, a restorative approach of creative restitution accepts both free will and psychological determinism. It redefines past responsibility in terms of damage or harm done, and can therefore accept psychological determinism for our past behavior without destroying the concept of our being responsible for what we have done. Similarly, it redefines present responsibility in terms of our ability or capacity for constructive, remedial action and can therefore accept free will for our present, ongoing behavior and for our future contemplated behavior, without destroying scientific explanations of past behavior. Only in restorative justice are determinations of past and present responsibility independent.14

According to Eglash, for thousands of years retributive justice and its technique of punishment for crime; for decades, distributive justice and its technique of therapeutic treatment for crime—these are the alternatives to restorative justice and its technique of restitution. Often in bitter opposition to each other, these two alternatives are in many respects very similar to each other, but are in sharp contrast with a restitution approach because of number of reasons: 15

1. While both punishment and treatment concern primarily offenders’ behavior, restorative justice focuses primarily on the destructive or harmful consequences of that behavior, its effect on the victims of the criminal act.

13 Ibid.
14 Ibid.
15 Supra note 9 at 621.
2. Similarly, both punishment and treatment overlook the victims, except as witnesses, restorative justice makes victims and their needs an important consideration and gives them an important role to play both in achieving justice and in developing a rehabilitative or correctional program.

3. Both punishment and treatment place offenders in a passive role of receiving corrective action. An analogy is traditional medicine, where patients passively receive either surgery or some form of medication. By contrast, in restorative justice the basic requirement is an active, constructive effort on the part of the offenders themselves. We might use the analogy of biofeedback therapy as a treatment of medical disorders in which the patients heal themselves;

4. Both punishment and treatment remove offenders from the situation in which the offense occurred. Creative restitution keeps the offender in the situation but reverses his behavior from one of taking or harming to one of giving or helping.

5. The logic or rationale of our two traditional approaches require that, when successfully applied, misbehavior will stop, either because of deterrence, avoidance of punishment, or resolution of the underlying emotional conflict motivating the behavior. Creative restitution, as a form of guidance, recognizes that guidance does not prevent errors; it only destroys fixated patterns so that learning can begin to occur. In Alcoholics Anonymous, for example, a "slip" is not an indication of failure, but a painful opportunity to learn.

6. Both punishment and treatment define past responsibility in terms of the circumstances or causes of the criminal act; and when there is a question of possible insanity, are committed to a specific position regarding "free will" versus "psychological determinism." Similarly, both approaches define present responsibility in terms of vulnerability to social discipline, either punishment or treatment; and both insist that present responsibility is related to the past.
Restorative justice, as Eglash (1977) defines it, is some distance from principles and practice associated with it today. However, some similarities can be discerned: a strong contrast between the failure of old, and the superiority of a new, justice form; relating an offender’s “effortful role” to the damage and harm caused by an offense; and an overly optimistic view of offenders’ abilities and interests to want to go to “the second mile” (i.e., complete restoration of goodwill and harmony).\(^{16}\)

**(II) RANDY E. BARNETT (1977)**

Randy Barnett's proposal for "a new paradigm" of restitution justice has elements that are more directly traceable to emerging ideas of restorative justice in domestic settings. This is because he defines crime as an offense of one person against another rather than against the state. He defines justice as a "culpable offender making good the loss" caused, and says that he is "against" punishment. According to him, “Characteristically punishment is unpleasant. It is inflicted on an offender because of an offence he has committed; it is deliberately imposed, not just the natural consequence of a person's action (like a hangover), and the unpleasantness is essential to it, not an accompaniment to some other treatment (like the pain of the dentist's drill).\(^{17}\)

A system of punishment, furthermore, offers no incentive for the victim to involve himself in the criminal justice process other than to satisfy his feelings of duty or revenge.\(^{18}\) The victim stands to gain little if at all by the conviction and punishment of the person who caused his loss. This is true even of those systems where state compensation based on the victim's need. But the system of justice itself imposes uncompensated costs by requiring a further loss of time and money by the victim and witnesses and by increasing the perceived risk of retaliation.\(^{19}\)

\(^{16}\) *Supra* note 12 at 93.


\(^{18}\) *Ibid*.

In its place he proposes "pure restitution' (rather than "punitive restitution," which is forced compensation or imposed fines). The goal is "reparations paid to the victim", which would be ordered, when an offender is "sentenced to make restitution to the victim". In Barnett's analysis, reparations (he uses the plural) and restitution refer to the same thing: financial payments. He considers a variety of ways of "repaying the victim" and addresses potential benefits of his proposal. On the contrary, Johnstone suggests that Barnett does not satisfactorily explain why "we are not entitled to impose punishment upon offenders but are entitled to force them to pay restitution." For example, Barnett argues for "pure restitution," but says that this is accomplished by sentencing an offender to make restitution. It is difficult to see how this differs from sentencing an offender to pay compensation.

(II)a BARNETT’S OUTLINE OF A NEW PARADIGM

Barnett’s idea of restitution is actually quite simple. It views crime as an offence by one individual against the rights of another. The victim has suffered a loss. Justice consists of the culpable offender making good the loss he has caused. It calls for a complete refocusing of our image of crime. Kuhn would call it a 'shift of world-view'. Where we once saw an offence against society, we now see an offence against an individual victim. In a way, it is a common sense view of crime. For instance, the armed robber did not rob society; he robbed the victim. His debt, therefore, is not to society; it is to the victim. There are really two types of restitution proposals: a system of ‘punitive’ restitution and a ‘pure’ restitution system.

20 Supra note 17 at 50.
22 Ibid.
24 Ibid.
1. **Punitive Restitution.** Since rehabilitation was admitted to the aims of penal law two centuries ago, the number of penological aims has remained virtually constant. Restitution is waiting to come in given this view; restitution should merely be added to the paradigm of punishment.

Stephen Schafer (1970) outlines the proposal: “[Punitive] restitution, like punishment, must always be the subject of judicial consideration. Without exception it must be carried out by personal performance by the wrong-doer, and should even then be equally burdensome and just for all criminals, irrespective of their means, whether they are millionaires or laborers.”

According to Schafer, there are many ways by which such a goal might be reached. The offender might be forced to compensate the victim by his own work, either in prison or out. If it came out of his pocket or from the sale of his own property this would compensate the victim, but it would not be sufficiently proportionate for the offender for his wrong-doing. Another proposal would be that the fines be proportionate to the earning power of the criminal. Thus, a poor man would pay in days of work and a rich man by an equal number of days’ income or salary.

Herbert Spencer (1970) supported the Schafer’s proposal along similar lines in his excellent ‘Prison Ethics’, which is well worth examining. Murray N. Rothbard and others have proposed a system of “double payments” in cases of criminal behavior. While closer to pure restitution than other proposals, the “double damages” concept preserves a punitive aspect.

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Thus, punitive restitution is an attempt to gain the benefits of pure restitution, which will be considered shortly, while retaining the perceived advantages of the paradigm of punishment. The prisoner is still ‘sentenced’ to some unpleasantness - prison labor or loss of X number of days' income. That the intention is to preserve the ‘hurt’ is indicated by the hesitation to accept an out of pocket payment or sale of assets. This is considered too easy for the criminal and takes none of his time. The amount of payment is determined not by the actual harm but by the ability of the offender to pay. Of course, by retaining the paradigm of punishment this proposal involves many of the problems we raised earlier. In this sense it can be considered another attempt to salvage the old paradigm.

2. Barnett’s Pure Restitution. Recompense or restitution is scarcely a punishment as long as it is merely a matter of returning stolen goods or money. The point is not that the offender deserves to suffer; it is rather that the offended party desires compensation. This represents the complete overthrow of the paradigm of punishment. No longer would the deterrence, reformation, disablement, or rehabilitation of the criminal be the guiding principle of the judicial system. The attainment of these goals would be incidental to, and as a result of, reparations paid to the victim. No longer would the criminal deliberately be made to suffer for his mistake. Making good that mistake is all that would be required. What follows is a possible scenario of such a system.

When a crime occurred and a suspect was apprehended, a trial court would attempt to determine his guilt or innocence. If found guilty, the criminal would be sentenced to make restitution to the victim. If a criminal is able to make restitution immediately, he may do so. This would discharge his liability. If he is unable to make restitution, but is found by the court to be trustworthy, he would be permitted to remain at his job (or find a new one) while paying restitution out of his future wages. This would entail a legal claim against future wages. Failure to pay could result in garnishment or a new type of confinement.

30 Supra note 26 at 131.
If it is found that the criminal is not trustworthy, or that he is unable to gain employment, he would be confined to an employment project\textsuperscript{31} and this would be an industrial enterprise, preferably run by a private concern, which would produce actual goods or services. The level of security at each employment project would vary according to the behavior of the offenders. Since the costs would be lower, inmates at a lower-security project would receive higher wages.

There is no reason why many workers could not be permitted to live with their families inside or outside the facility, depending again on the trustworthiness of the offender. Room and board charges would be deducted from the wages first, then a certain amount for restitution. Anything over that amount the worker could keep or apply toward further restitution, thus hastening his release. If a worker refused to work, he would be unable to pay for his maintenance, and therefore would not in principle be entitled to it. If he did not make restitution he could not be released.

The exact arrangement which would best provide for high productivity, minimal security, and maximum incentive to work and repay the victim cannot be determined in advance. Experience is bound to yield some plans superior to others.\textsuperscript{32}

While this might be the basic system, all sorts of refinements are conceivable, and certainly many more will be invented as needs arise. A few examples might be illuminating. With such a system of repayment, victim crime insurance would be more economically feasible than at present and highly desirable. The cost of awards would be offset by the insurance company's right to restitution in place of the victim (right of subrogation).


The insurance company would be better suited to supervise the offender and mark his progress than would the victim. To obtain an earlier recovery, it could be expected to innovate so as to enable the worker to repay more quickly (and, as a result, be released that much sooner).

The insurance companies might even underwrite the employment projects themselves as well as related industries which would employ the skilled worker after his release. Any successful effort on their part to reduce crime and recidivism would result in fewer claims and lower premiums. The benefit of this insurance scheme for the victim is immediate compensation, conditional on the victim's continued cooperation with the authorities for the arrest and conviction of the suspect. In addition, the centralization of victim claims would, arguably, lead to efficiencies which would permit the pooling of small claims against a common offender.

Another highly useful refinement would be direct arbitration between victim and criminal. This would serve as a sort of healthy substitute for plea bargaining. By allowing the guilty criminal to negotiate a reduced payment in return for a guilty plea, the victim (or his insurance company) would be saved the risk of an adverse finding at trial and any possible additional expense that might result. This would also allow an indigent criminal to substitute personal services for monetary payments if all parties agreed.

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34 Ibid.
36 Ibid.
38 Ibid.
Arbitration is argued for by John M. Greacen, former director of the National Institute for Law Enforcement and Criminal Justice, 1977, Mexico. He sees the possible advantages of such reform as the development of more creative dispositions for most criminal cases; for criminal victims the increased use of restitution, the knowledge that their interests were considered in the criminal process; and an increased satisfaction with the outcome; increased awareness in the part of the offender that his crime was committed against another human being, and not against society in general; increased possibility that the criminal process will cause the offender to acknowledge responsibility for his acts.\textsuperscript{39} Greacen notes several places where such a system has been tried with great success, most notably Tucson, Arizona, Columbus, and Ohio.\textsuperscript{40}

Something analogous to the medieval Irish system of \textit{sureties} might be employed as well.\textsuperscript{41} Such a system would allow a concerned person, group, or company to make restitution (provided the offender agrees to this). The worker might then be released in the custody of the surety. If the surety had made restitution, the offender would owe restitution to the surety who might enforce the whole claim or show mercy. Of course, the more violent and unreliable the offender, the more serious and costly the offence, the less likely it would be that anyone would take the risk. But for first offenders, good workers, or others that charitable interests found deserving (or perhaps unjustly convicted) this would provide an avenue of respite.\textsuperscript{42}

\textsuperscript{39} \textit{Ibid.}


\textsuperscript{42} \textit{Ibid.}
The possible refinements aforesaid clearly illustrate the flexibility of a restitution system. It may be less apparent that this flexibility is inherent to the restitution paradigm. Restitution recognizes rights of the victim, and this is a principal source of its strength. The nature and limit of the victim's right to restitution at the same time defines the nature and limit of the criminal liability.

In this way, the aggressive action of the criminal creates a debt to the victim. The recognition of rights and obligations make possible many innovative arrangements. Subrogation, arbitration, and surety-ship are three examples mentioned above. They are possible because this right to compensation is considered the property of the victim and can therefore be delegated, assigned, inherited, or bestowed. One could determine in advance who would acquire the right to any restitution which he himself might be unable to collect.

**ADVANTAGES OF A RESTITUTION SYSTEM**

1. The first and most obvious advantage is the assistance provided to victims of crime. They may have suffered an emotional, physical, or financial loss. Restitution would not change the fact that a possibly traumatic crime has occurred (just as the award of damages does not undo tortuous conduct). Restitution, however, would make the resulting loss easier to bear for both victims and their families. At the same time, restitution would avoid a major pitfall of victim compensation/welfare plans: Since it is the criminal who must pay, the possibility of collusion between victim and criminal to collect 'damages' from the state would be all but eliminated.

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2. The possibility of receiving compensation would encourage victims to report crimes and to appear at trial.\textsuperscript{47} This is particularly true if there were a crime insurance scheme which contractually committed the policyholder to testify as a condition for payment, thus rendering unnecessary oppressive and potentially tyrannical subpoenas and contempt citations.\textsuperscript{48} Even the actual reporting of the crime to police is likely to be a prerequisite for compensation. Such a requirement in auto theft insurance policies has made car thefts the most fully reported crime in the United States. Furthermore, insurance companies which paid the claim would have a strong incentive to see that the criminal was apprehended and convicted.\textsuperscript{49} Their pressure and assistance would make the proper functioning of law enforcement officials all the more likely.\textsuperscript{50}

3. Psychologist Albert Eglash has long argued that restitution would aid in the rehabilitation of criminals. Restitution is something an inmate does, not something done for or to him . . . Being reparative, restitution can alleviate guilt and anxiety, which can otherwise precipitate further offences.\textsuperscript{51} Eglash says that restitution is an active effortful role on the part of the offender. It is socially constructive, thereby contributing to the offender's self-esteem. It is related to the offence and may thereby redirect the thoughts which motivated the offence. It is reparative, restorative, and may actually leave the situation better than it was before the crime, both for the criminal and victim.\textsuperscript{52}

\textsuperscript{48} Ibid.
\textsuperscript{50} Ibid.
\textsuperscript{51} Supra note 19 at 25.
4. This is a genuinely 'self-determinative' sentence. The worker would know that the length of his confinement was in his own hands. The harder he worked, the faster he would make restitution. He would be the master of his fate, and would have to face that responsibility. This would encourage useful, productive activity and instill a conception of reward for good behavior and hard work.

Compare this with the current probationary system and ‘indeterminate sentencing’ where the decision for release is made by the prison bureaucracy, based only (if fairly administered) on ‘good behavior’; that is, passive acquiescence to prison discipline. Also, the fact that the worker would be acquiring marketable skills rather than more skillful methods of crime should help to reduce the shocking rate of recidivism.

5. The savings to taxpayers would be enormous. No longer would the innocent taxpayers pay for the apprehension and internment of the guilty. The cost of arrest, trial, and internment would be borne by the criminal himself. In addition, since now-idle inmates would become productive workers (able, perhaps, to support their families), the entire economy would benefit from the increase in overall production.

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54 Ibid.
55 Ibid.
6. Crime would no longer pay. Criminals, particularly shrewd white-collar criminals, would know that they could not dispose of the proceeds of their crime and, if caught, simply serve time.\textsuperscript{60} They would have to make full restitution plus enforcement and legal costs, thereby greatly increasing the incentive to prosecute.

The concept “restorative justice” would not be helpful to control/eliminate the white-collar crimes or the large scale transnational organized crime\textsuperscript{61} rather it would make it rougher on certain types of criminals, like bank and corporation officials, who harm many by their acts with a virtual assurance of lenient legal sanctions.\textsuperscript{62} It might also encourage such criminals to keep the money around for a while so that, if caught, they could repay more easily. This would make a full recovery more likely.\textsuperscript{63}

On the whole, a restitution system of justice would benefit the victim, the criminal, and the taxpayer. The humanitarian goals of proportionate punishment, rehabilitation, and victim compensation are dealt with on a fundamental level making their achievement more likely.

In short, the paradigm of restitution would benefit all but it entrenched penal bureaucracy and enhances justice at the same time. What then is there to stop us from overthrowing the paradigm of punishment and its penal system and putting in its place this more efficient, more humane, and more just system?


\textsuperscript{61} Transnational organized crime (TOC) is a systematic illegal activity that involves two or more sovereign jurisdictions, but which are codified in the national legislations of these jurisdictions with intend to acquire power or profit. Thus, TOC is a huge formal association of criminals with the main motive to earn money and restorative justice would be inefficient in controlling these large groups.

\textsuperscript{62} \textit{Supra} note 60 at 255.

\textsuperscript{63} \textit{Ibid}.
(iii) NILS CHRISTIE (1977)

Nils Christie focuses more on the processes and procedures of optimal justice activities than sanctions alone. His article opens by taking us to a small village in Tanzania, where there is a conflict about property after a marital engagement broke off. He approves of the way the dispute (a civil matter) is settled: the protagonists are at the center of attention, with family members and other villagers participating. They are the experts, not the judges.  

Christie puts forward the two related points regarding “conflicts”:

First, professionals, especially lawyers are particularly good at stealing conflicts between individuals. Conflicts become the property of lawyers. But lawyers don't hide that it is conflicts they handle. And the organizational framework of the courts underlines this point. The opposing parties, the judge, the ban against privileged communication within the court system, the lack of encouragement for specialization - specialists cannot be internally controlled - it all underlines that this is an organization for the handling of conflicts. Treatment personnel are in another position. They are more interested in converting the image of the case from one of conflict into one of non-conflict.

Second these conflicts should be seen "as property" because they have great value. They offer a chance for people to participate in society, they provide “opportunities for norm clarification,” and they help protagonists to meet and get to know each other. These interactions and “personalized encounters” bring victims more fully into the criminal process and invite reflection by an offender about “how he can make good again”. His ideas for a model court go further than others in suggesting how civil and criminal processes might be blended.

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66 Ibid.
67 Supra note 64 at 4.
According to Nils Christie, it is the “conflict” itself that represents the most interesting property taken away, not the goods originally taken away from the victim or given back to him. In our types of society, conflicts are more scarce than property. And they are immensely more valuable.\textsuperscript{68}

Christie says that the victim is a particularly heavy loser in all types of conflicts. Not only has he suffered, lost materially or become hurt, physically or otherwise. And not only does the state take the compensation. But above all he has lost participation in his own case (i.e. conflict).\textsuperscript{69} It is the Crown that comes into the spotlight, not the victim. It is the Crown that describes the losses, not the victim. It is the Crown that appears in the newspaper, very seldom the victim. It is the Crown that gets a chance to talk to the offender, and neither the Crown nor the offender is particularly interested in carrying on that conversation.\textsuperscript{70} The prosecutor is fed-up long since. The victim would not have been. He might have been scared to death, panic-stricken, or furious. But he would not have been uninvolved. It would have been one of the important days in his life. Something that belonged to him has been taken away from that victim.\textsuperscript{71}

A further general loss both for the victim and for society in general has to do with anxiety-level and misconceptions.\textsuperscript{72} It is again the possibilities for personalized encounters I have in mind. The victim is so totally out of the case that he has no chance, ever, to come to know the offender. We leave him outside, angry, maybe humiliated through a cross-examination in court, without any human contact with the offender.

\textsuperscript{68} Ibid.
\textsuperscript{69} Ibid.
\textsuperscript{71} Ibid.
(iii)a NILS CHRISTIE’S VICTIM CENTERED AND LAY ORIENTED COURT

Christie’s proposed court is victim centered and lay-oriented, and has four stages. The first is to establish that a law has been broken and the right person is identified. The second is to focus attention on the victim’s situation and what can be done to address it, “first and foremost by the offender”, then the local neighborhood, and then the state. Christie has in mind repairing windows and locks, offenders paying compensation with money or by performing labor for a victim, and in other ways, “restoring the victim's situation”. After all of this occurs, the third stage is a judicial officer deciding if further punishment is required, “in addition to those unintended constructive sufferings the offender would go through in his restitutive actions for the victim.” The last stage, which is post-sentence, is service to an offender. This would include addressing his or her social, medical, and educational needs i.e., to reintegrate the offender into the society.

Several observations can be drawn from the early works that are now linked to restorative justice. First, the authors (such as Albert Eglash, Randy Barnett and Nils Christie) all believe that conventional criminal justice is a failure, and they propose different models of criminal justice. Second, they argue that convicted defendants should have a more direct and constructive role in “re-paying” victims for crime. This role is variably termed as creative restitution, pure restitution, restorative justice, or restoring the victim's situation. The authors refer to the consequences of this new offender’s role as restoration, making reparations, healing, among other terms; and they have different ideas about its impact on offenders. Eglash believed that the new role might change an offender in positive ways, whereas Christie did not expect or care if face-to-face meetings led to reductions in reoffending. Third, the authors struggle in imagining how this new role for offenders relates to conventional criminal justice. For all (except Christie), there is a rejection of punishment and the "retributive paradigm" and a desire to identify "non-punitive," more constructive responses. Finally, (for Christie), there is also a new role for victims and others, who should be able to speak and participate in decisions about responding to crime.
HOWARD ZEHR (1985)

Howard Zehr's contrast of retributive and restorative justice tracks Barnett’s argument closely in several ways, but departs from it in others. Zehr also argues for a new paradigm, but he calls it restorative justice. Like Barnett, he redefines crime (an offense between two individuals), but has many more terms associated with justice, including restoration, reconciliation, the process of making things right, right relationships measured by the outcome, repair of social injury, and healing.

Like Barnett, Zehr’s preferred response is restitution, which he sees “as a means of restoring both parties” not as a type of punishment. Zehr is also concerned with addressing conflict between individuals: he calls for offenders and victims “to see one another as persons, to establish or re-establish a relationship.” Compared to Barnett, who draws mainly from legal authority, Zehr draws from religious history and Judeo-Christian ideals. His work with the Victim-Offender Reconciliation Project, a Mennonite-based program that facilitated meetings between victims and imprisoned offenders, informed a good deal of his early thinking about restorative justice.

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75 Ibid.
77 Since 1982 Victim Offender Reconciliation Program (VORP) has been bringing victims and offenders together in safe mediation or family group conference settings to permit the offender to take responsibility for his or her actions, to make things as right as possible with the victim, and to be clear about future intentions. VORP follows up to ensure that agreements are kept.
78 Zehr previously served 19 years as director of Mennonite Central Committee’s Office on Crime and Justice. He is considered a pioneer in the field of Restorative Justice, a response to Criminal Justice that focuses on repairing harm rather than establishing deterrence.
### Howard Zehr's

**Paradigms of Justice – Old and New**

<table>
<thead>
<tr>
<th>Old Paradigm - Retributive Justice</th>
<th>New Paradigm - Restorative Justice</th>
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<td>1. Crime defined as violation of the State.</td>
<td>1. Crime defined as violation of one person by another.</td>
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<td>2. Focus on establishing blame, on guilt; on past (did he/she do it?).</td>
<td>2. Focus on problem-solving, on liabilities and obligations, on future (what should be done?).</td>
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<td>3. Adversarial relationships and process normative.</td>
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| 10. Action directed from state to offender:  
- Victim ignored  
- Offender passive | 10. Victim's and offender's roles recognized in both problem and solution:  
- Victim rights/needs recognized.  
- Offender encouraged to take responsibility. |
| 11. Offender accountability defined as taking punishment. | 11. Offender accountability defined as understanding impact of action and helping decide how to make things right. |
| 12. Offence defined in purely legal terms, devoid of moral, social, economic, political dimensions. | 12. Offence understood in whole context – moral, social, economic, political. |
| 13. 'Debt' owed to state and society in the abstract. | 13. Debt/liability to victim recognized. |
| 16. No encouragement for repentance and forgiveness. | 16. Possibilities for repentance and forgiveness. |
| 17. Dependence upon proxy professionals. | 17. Direct involvement by participants. |
(iv)a Howard Zehr’s Three Pillars of Restorative Justice

Three central concepts or pillars or principles of restorative justice deserve a closer look: harms and needs, obligations, and engagement.  

a) Restorative Justice Focuses on “Harm”

Restorative justice understands that crime gives impetus to harm done to people and communities. Our legal system, with its focus on rules and laws, and with its view that the state is the victim, often loses sight of this reality.  

Concerned primarily with making sure offenders get what they deserve, the legal system considers victims, at best, a secondary concern of justice. Focusing on harm, on the contrary, implies an inherent concern for victims’ needs and roles.  

For restorative justice, justice begins with a concern for victims and their needs. It seeks to repair the harm as much as possible, both concretely and symbolically. This victim oriented approach requires that justice be concerned about victims’ needs even when no offender has been identified or apprehended.  

While our first concern must be the harm experienced by victims, the focus on harm implies that we also need to be concerned about harm experienced by offenders and communities. This may require us to address the root causes of crime. The goal of restorative justice is to provide an experience of healing for all concerned. 


80 *Ibid*.


82 *Ibid*. 

73
b) **WRONGS OR HARMS RESULT IN “OBLIGATIONS”**

Restorative justice emphasizes offender’s accountability and responsibility. The prevailing criminal justice system defines accountability as making sure offenders are punished, if crime is essentially about harm.\(^8\) In case of restorative justice system, accountability means offenders must be encouraged to understand that harm. Offenders must begin to comprehend the consequences of their behavior.\(^4\) Moreover, it means they have a responsibility to make things right as much as possible, both concretely and symbolically. As we all know that the first obligation is the offender’s, but the community and society have obligations as well.\(^5\)

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\(^4\) *Ibid*.

c) RESTORATIVE JUSTICE PROMOTES ENGAGEMENT OR PARTICIPATION

The principle of engagement suggests that the primary parties affected by crime—victims, offenders, members of the community—are given significant roles in the justice process. These “stakeholders” need to be given information about each other and to be involved in deciding what justice requires in this case.\(^8\)

In some cases, this may mean actual dialogue between these parties, as happens in victim offender conferences. They would share their stories and come to a consensus about what should be done. In other cases, it may involve indirect exchanges, the use of surrogates, or other forms of involvement.\(^7\)

The principle of engagement implies involvement of an enlarged circle of parties as compared to the traditional justice process.\(^8\)

So restorative justice is constructed upon three simple elements or pillars: harms and related needs (of victims, first of all, but also of the communities and the offenders); obligations that have resulted from (and given rise to) this harm (the offenders’, but also the communities’); and engagement of those who have a legitimate interest or stake in the offense and its resolution (victims, offenders, and community members).\(^9\)


Braithwaite’s concept of “reintegrative shaming” began to be applied in the early 1990s as the theory guiding “community conferencing” and then, restorative justice. Community conferences are meetings between an admitted offender, victim, and their supporters and other relevant participants, guided by a facilitator (a police officer or other professional) with the aims of encouraging offender accountability, victim voice, mutual understanding, and group decision-making on fashioning an outcome.

The theory of “reintegrative shaming” argues that the importance of social disapproval has generally been underestimated by institutions of criminal justice as well as criminological theory. It argues that to understand crime rates we need to look at the degree to which offending is shamed and whether shaming is reintegrative or stigmatic.

Braithwaite defines “reintegrative shaming” as disapproval that is respectful of the person, is terminated by forgiveness, does not label the person as evil, nor allows condemnation to result in a master status trait. The theory predicts that the practice of reintegrative shaming will result in less offending.

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90 Braithwaite is a Professor in Law, Research School of Social Sciences at Australian National University (ANU), and a member of ANU’s Centre for Restorative Justice. He has contributed to the application of restorative justice principles in both criminal and business crime. His focus for twenty years has been on restorative and responsive regulatory ideas.

91 Braithwaite, John (1989). Crime, Shame and Reintegration, New York, NY: Cambridge University Press. In his book, he suggested the concept of “re-integrative shaming” which emphasizes the importance of shame in criminal punishment. The theory of “re-integrative shaming” is more positive, and involves making wrongdoers feel guilty while showing them understanding, forgiveness, or even respect.

92 A Restorative Community Conference is an opportunity for a young person who has been charged with an offence to meet with the people affected by his or her behavior in a facilitated process that addresses: 1. what is the harm? 2. How can the harm be repaired? And 3. Who is responsible for repairing the harm? Personal healing and accountability are key components of such “conferences.”
Conversely, the theory of “reintegrative shaming” suggests that stigmatizing shaming is not respectful of the person, is not terminated by forgiveness, labels the person as evil and allows them to attain a master status trait. The theory further predicts that this latter type of shaming results in greater levels of offending.  

Although an important feature of the theory is that it integrates the predictions of several theoretical perspectives into a single framework, its focus upon shaming is probably its most distinctive contribution. The theory defines shaming as: “all societal processes of expressing social disapproval which have the intention or effect of invoking remorse in the person being shamed and/or condemnation by others who become aware of the shaming.”

The conception of ‘shaming’ is distinctively broad, such that shaming is not necessarily public, humiliating or even defined as a special type of behavior. It might, for example, involve a discussion between parents and a child of how an act impacted upon others. Equally, a fine handed down by a court might be evaluated on the extent to which it is shaming: the extent to which it is an expression of disapproval towards the offender's behavior.

Use of the term 'shaming,' rather than simply ‘disapproval,’ implies the expectation that the process will result in a shame-related emotion and that this emotion is an important quality of the interaction. In arguing for the positive effects of reintegrative shaming, Braithwaite highlights two mechanisms at work here.

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95 Ibid.  
96 Supra note 91 at 72.
One of these is that reintegrative shaming is an effective deterrent, particularly when it comes from those who the individual is close to, because it poses a threat to relationships that are valued. Yet, reintegrative shaming is meant to transcend the rational actor model of deterrence. The second mechanism, which Braithwaite suggests is more important, is that reintegrative shaming communicates that certain behaviors are morally wrong and thus builds internalized controls or conscience. Braithwaite argues, "Shaming is more pregnant with symbolic content than punishment. Punishment is a denial of confidence in the morality of the offender by reducing norm compliance to a crude cost—benefit calculation; shaming can be a reaffirmation of the morality of the offender by expressing personal disappointment that the offender should do something so out of character."

Although the specific emotion is not clearly identified, both of these mechanisms, fear of disapproval and bad conscience, allude to shame-related emotions. The implication, which has not yet been empirically tested, is that the effect of disapproval on behavior is mediated by the emotions that disapproval causes or what Braithwaite labels ‘shame.’ Still, despite the central role assigned to shame in his theory, Braithwaite provided almost no analysis of what the concept is and how it works.

(vi) OTHER CONTRIBUTORS

An attempt to root restorative concepts within a larger conceptual framework was offered in a 1994 book edited by Jonathan Burnside and Nicola Baker, titled “Relational Justice”. 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 suggested ways the activities of police, probation, and prison authorities might be evaluated by their capacity to strengthen relationships.

97 Ibid.
98 Ibid.
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, Executive Director of the U.S.-based National Organization for Victim Assistance in her 1995 paper, *Restorative Community Justice: A Call to Action*. After defining restorative community justice, she reviewed a series of program elements that might constitute a model of such a system. Those included 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 victim and community participation during adjudication; and community corrections offers communities and victims meaningful ways of participating in the correctional process.

### 3. LATER DEVELOPMENTS RELATING TO RESTORATIVE JUSTICE

In this section, some selected conceptual developments as restorative justice evolved, with a focus on key terms such as reparation, restoration, and restitution, and related understandings of what constitutes reparative and restorative processes and outcomes. Four points are clear. First, there is inconsistent use of key terms. Second, there is no single definition of restorative justice: advocates, critics, and researchers conceptualize and want to apply the idea in different ways. Third, as ideas of reparative and restorative processes and outcomes gained in popularity, particularly with governments, they were mislabeled and misused. Fourth, restorative justice has become unleashed from criminal justice and is increasingly difficult to characterize.

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VARIENCES IN ‘KEY TERMS’ OF RESTORATIVE JUSTICE DURING 90s

Galaway and Hudson\textsuperscript{101} (1996) exemplify what is and continues to be an inconsistent use of key terms. The contributing authors use the terms ‘reparation’ and ‘restitution,’ either together or separately, to refer to outcomes, typically financial or labor (e.g., community service), that may come from restorative justice. ‘Reconciliation’ is rarely defined although it is often named as a goal of restorative justice. Contributors write from their own frames of reference as each attempts to understand and come to terms with the idea of restorative justice, and there is little reflection on the disparate use of terms. One exception is by Allan Harland, who says the field should define and clarify the most essential aims and related mechanisms, beginning with restoration itself but also reconciliation, reparation to the community, mediation, and so on.\textsuperscript{102}

A significant theoretical contribution to the volume is Retzinger and Scheff who consider the social-psychological mechanisms in the community conferences they observed in Australia.\textsuperscript{103} They distinguish "material" and "symbolic reparation" processes. The former leads to a specific outcome, what an offender agrees to do (or, as they say, "restitution or compensation for damage done, and some form of community service."). This is the visible and “largely unambiguous” part of the process. Less visible and more complex is an ideal outcome of "symbolic reparation," which has two steps in the "core sequence" First the offender "clearly expresses genuine shame and remorse over his/her actions" and next "in response, the victim takes a first step toward forgiving the offender for the trespass" This core sequence "generates repair and restoration of the bond between victim and offender which was severed by the offender's crime."


Further, Retzinger and Scheff say that the repair of this bond “symbolizes a more extensive restoration that is to take place between the offender and other participants.” The core sequence may "only be a matter of few seconds/minutes" but it is “the key to reconciliation, victim satisfaction, and decreasing recidivism.” Without the core sequence, they argue that the "path toward settlement is strewn with impediments." They view symbolic reparation as unique to community conferences compared to any other type of justice system response. Importantly, they discovered that symbolic reparation did not occur in the formal phase of any of the conferences they observed. This was because offenders did not “clearly express genuine shame and remorse.” Such expression, or what may be termed a "sincere apology" is “a difficult and delicate undertaking even when the transgression is minor.” and this is further complicated by the presence of third parties, as occurs in the conference process.

Strang also considers the "emotional dimensions" of victimization, emphasizing that victims see “emotional restoration as far more important than material or financial reparation.” According to Strang, "often what victims want most is not substantial reparation but rather symbolic reparation, primarily an apology." Strang depicts the material forms of recompense with a plethora of terms (variably as restitution, material restitution, material restoration, material reparation, material compensation, substantial reparation, and financial reparation), a not atypical pattern in the field.

104 Ibid.
108 *Id.* at 185.
However, what may be queried is equating “symbolic reparation” with “an apology” This is because Retzinger and Scheff point out that the core sequence involves not only an offender expressing genuine remorse but also a readiness and ability of a victim to respond. Although an apology is the first step in the core sequence, a victim has an equally important role in deciding to acknowledge and respond to it.\textsuperscript{109} Further, as Retzinger and Scheff suggest symbolic reparation “depends entirely upon the play of emotions and social relationships during the conference.”\textsuperscript{110}

By contrast, Duff defines restoration as the reinstatement of a victim to an "original favorable condition," whereas "reparation and compensation ... make up for the loss of what cannot be restored...... and are the means to restoration."\textsuperscript{111} He then asks, "What can repair the wrong that was done?" His answer was an apology which includes elements of “recognition, repentance, and reconciliation.”\textsuperscript{112} To give added “forceful expression” to an apology, Duff identifies the following as examples of "moral reparation: undertaking some service for the victim, buying a gift, contributing time or money to a charity."\textsuperscript{113} Sharpe picks up on Duff’s point but refers to his cited examples of moral reparation as types of symbolic reparation (which are sometimes also called partial restitution).\textsuperscript{114}

\begin{flushright}
\textsuperscript{109} Supra note 101 at 319. \\
\textsuperscript{110} Ibid. \\
\textsuperscript{112} Id at 87. \\
\end{flushright}
Still other writers do not distinguish material and symbolic reparation. For example, while recognizing that victim-offender meetings aim to address "victims' emotional needs as well as their material ones” Marshall itemizes the following simply as forms of reparation; money payments, work for a victim or community case, undergoing counseling, or a combination of these. Zedner discusses the material and symbolic (which she also terms "psychological") forms of reparation but notes that in practice the differences between them are not clear-cut: “sums paid in compensation seldom approach the actual value of the loss suffered, and the significance of the payment may often be largely symbolic.”

Restoration, as a concept, faces another critique. Most people assume or claim that the goal of restorative justice is restoration or "to restore" a victim. In other words, it is understood literally to mean a justice activity that aims to restore a person to their original position. Others suggest that restorative Justice should be viewed as a nominal concept, standing for a set of justice activities and it should not be narrowly construed as restoring people, property, or social relations. One reason for taking the latter view is that it addresses the appropriateness of restorative justice for gendered violence, who says that "the concept of restoration suggests that a prior state existed in which a domestic violence victim experienced significant liberty and the offender was integrated into the community.” Other critics say that the point is not restoration to a status quo or what existed before, but rather a transformation of social relations and society.

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119 Ibid.
According to Von Hirsch and Ashworth, Restorative justice seeks to repair the harm done by crime. Whenever possible this repair should be done by the persons responsible for the harm. That is why restorative justice values efforts by offenders to make “amends.”

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According to them, there are four elements or facets of amends: apology, changed behavior, restitution, and generosity. Each element has potential for helping the victim to heal and the offender to become a productive part of the community, although usually more than one will be involved in a restorative outcome. It is the victim and offender who decides which ones are important and feasible in particular cases. That is why restorative encounters are important.

(II)a APOLOGY An apology can be written or verbal. The three parts of apology are acknowledgement, affect, and vulnerability. With acknowledgement, the offender accepts responsibility for hurting the victim by his/her actions. The offender also accepts that there was real harm caused by this conduct. Finally, the offender accepts that the harm caused was experienced by another human being who did not deserve the harm.

Affect goes beyond acknowledgement of guilt to remorse or shame by the offender for what he/she has done. Regret may be expressed verbally or through body language. Witnessing offenders express regret can be healing for victims. However, the offender may feel deep regret but can be unable to express it in ways that can be appreciated fully by the victim.

Vulnerability has to do with a shift in power between the offender and the victim. One of the realities of crime is that the offender has asserted control over the victim in order to commit the crime. In apologizing, the offender gives control to the victim, who can decide whether or not to accept the apology. The offender cannot know what the victim will do before offering the apology. In offering the apology, the offender cedes to the victim the control and power over himself/herself.

\[\text{Ibid.}\]
\[\text{Id at 581.}\]
\[\text{Jacobson, Jessica and Penelope Gibbs (2009), Making Amends: Restorative Youth Justice in Northern Ireland, UK: Prison Reform Trust, p-13.}\]
\[\text{Ibid.}\]
(II)b CHANGED BEHAVIOR  At the most basic level, changed behavior by the offender means not committing crimes. This is why negotiated agreements will include elements such as changing the offender's environment, helping the offender learn new behaviors, and rewarding positive change. At the most basic level, changed behavior by the offender means not committing crimes. This is why negotiated agreements will include elements such as changing the offender's environment, helping the offender learn new behaviors, and rewarding positive change.\textsuperscript{126} Attending school and not hanging out in old haunts are ways to change the environment. Drug treatment programs, anger management classes, and educational and job training programs are ways that offenders learn new behaviors. Follow-up meetings to the encounters may be used to monitor the offender's progress in trying to change and give him/her positive reinforcement on progress made.\textsuperscript{127} 

(II)c GENEROSITY  But the outcomes of restorative processes suggests that victims and offenders may move beyond simply balancing the books. Offenders may offer to perform services that are not related to the crime or to the victim, but that are understood by the victim as evidence of a sincere apology. For example, the offender may agree to perform community service at an agency the victim chooses.\textsuperscript{128} 

(II)d RESTITUTION  Restitution can be made by returning or replacing property, paying money, or providing direct services to the victim. Restitution should be paid first to the persons suffering direct harm from the crime, including surviving family members of murder victims.\textsuperscript{130} If community service is ordered or agreed to as a way of "paying a debt to society", rather than volunteered as evidence of generosity, it is important to have a clear link between the crime and the community service, the offender will do. Ideally, it will have a direct bearing on the needs and interests of the victim. 

\textsuperscript{127} Ibid. 
\textsuperscript{128} Id at 331. 
\textsuperscript{130} Ibid.
4. **LATEST CONCEPTIONS AND DEFINITIONS OF RESTORATIVE JUSTICE**

Johnstone and Van Ness argue that restorative justice is not only a "persistently vague concept, it is in fact a deeply contested concept." There is no one definition, nor should this be expected because, they say, the character of the restorative justice movement is not coherent or unified.

It is a complex idea, the meaning of which continues to evolve with new discoveries. Some definitions focus on the elements of restorative processes (i.e., repair, restore, reconciliation, and reintegration). Others begin with the idea 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. The idea of restorative justice typically center on three basic conceptions that proposed definitions of restorative justice i.e.

(i) the *Encounter* Conception (a focus on the processes of face-to-face meetings and decision-making);

(ii) the *Reparative* Conception (a focus on outcomes that “repair the harm” including those decided by criminal justice professionals);

(iii) the *Transformation* Conception (a focus on transformations of self and society).

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132 *Supra* note 79 at 31.


THE ENCOUNTER CONCEPTION

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 victim, offender, 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 professional connection to the crime and to those who were touched by it. Decisions are not made by the parties, but by the judge. While the defendant generally has a lawyer, the victim does not; instead, the victim's interests are considered to be identical with society's interests, which the prosecutor represents.

The encounter conception would not consider something restorative if it does not involve the victim, offender, and other parties meeting together.

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136 The word ‘stakeholders’ comprises direct as well as indirect stakeholders. The direct stakeholders include victim, offender, and family members of both victim and offender (including those who may be similarly affected). The neighbors and other important members of the society would come under the concept of “indirect stakeholders.”


(ii) **THE REPARATIVE CONCEPTION**

The second is the reparative conception. "Crime causes harm; justice must repair that harm."\(^{141}\) The harm is 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 those. However, this conception is not limited by the inability or unwillingness of the parties to meet. In those circumstances it would insist that court proceedings focus on identifying and taking steps to repair the harm caused by the crime.

The *reparative* conception would not describe something as restorative if it did not provide some sort of redress to direct victims and, perhaps, communities and offenders as well.\(^{142}\)

(iii) **THE TRANSFORMATION CONCEPTION**

This is more expensive because it has to do with broken relationships at multiple levels of society. It addresses not simply individual instances of harm but goes beyond to structural issues of injustice such as racism, sexism, and classism.\(^{143}\) Each of these prevents people from living in whole, harmonious, and healthy relationships with others and with their social and physical environments. Restorative justice is therefore a way of life because it addresses all of our relationships, and it offers a way in which broken relationships can be repaired (often through challenging existing societal injustices).\(^{144}\) The *transformation* conception would not describe something as restorative if it did not address structural impediments to wholesome, healthy relationships.\(^{145}\)

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The three conceptions are closely related, and most proponents would find themselves at home in each of the three depending on the context of the conversation. However, most also will, when required to offer a precise definition, articulate something that draws primarily from one, or that establishes a ranking of importance among them.

Etymology, the concept of restorative justice falls within the *reparative* conception, with one important proviso: repair is most fully accomplished when it results from an *encounter* of the parties. Following my discussion, the definition of restorative justice can be summed up as under:-

Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behavior. It is best accomplished through cooperative processes that include all stakeholders. It is an invitation to join in conversation so that we may support and learn from each other. It is a reminder that all of us are indeed interconnected.\(^{146}\)

Some writers emphasize the process; others the outcome; and others still focus on the *values* associated with it. Not surprisingly, the list of values varies, depending on the writer. For example, Van Ness identifies four values of encounter, amends, reintegration, and inclusion, which are then linked to a set of activities or outcomes that should be in a “fully restorative response.”\(^{147}\) Braithwaite has a far more elaborated structure of twenty-four values.\(^{148}\)


Johnstone (2008) identifies five agendas of restorative justice to distinguish the different political directions the field is taking. Agenda one, the most familiar, is concerned with changing the response to crime; two, with changing the way in which “crime” and “justice” are defined; three, with widening the uses of restorative justice to other organizational settings (e.g. schools, prisons, workplaces); four, with “projects of political reconciliation” (e.g., applications post conflict societies, among others); and five, with transforming social organization and “personal lifestyle.” Although these agendas may overlap and are themselves “internally complex,” the point is that people are seeking to achieve different aims under the rubric of restorative justice.149

5. AGENDA OF RESTORATIVE JUSTICE IN 21ST CENTURY

Reflecting, in part, the different agendas of restorative justice, two types of conceptual expansion have occurred. First, the well-known restorative justice advocate and theorist John Braithwaite has created a far larger, more encompassing project, based on a transformative agenda. His work evolved from more modest beginnings applications to youth crime in the early and mid-1990s by applying the concept of “reintegrative shaming” but expanded at the turn of the twenty-first century to include broader mechanisms of regulation and societal transformation.150 Indicative of his vision of “holistic restorative justice,” Braithwaite argues that it is not just about “reforming the criminal justice system, but a way of transforming our entire legal system, our family lives, our conduct in the workplace, our practice of politics.”151 He continues by saying that restorative justice is about struggling against injustice in the most restorative way we can manage.... It targets injustice reduction not merely crime reduction. It aspires to offer practical guidance on how we cart lead the good life as democratic citizens by struggling against injustice. It says we must conduct that struggle while seeking to dissuade hasty resort to punitive rectification or other forms of stigmatizing response.

150 Supra note 128 at 61.
151 Ibid.
Like others, but in a more sophisticated fashion, Braithwaite takes a values orientation to restorative justice. He identifies twenty-four values of three types: constraining (specifying rights and limits), maximizing (specifying sites and types of restoration), and emergent (properties such as remorse, apology, and forgiveness that emerge when restorative justice succeeds, but which cannot be expected to occur). The maximizing values include not only emotional restoration but also restoration of human dignity, property loss, safety or health, damaged human relationships, communities, the environment, freedom, compassion or caring, peace, and sense of duty as a citizen. This list is more extensive than any other in the field today, which normally includes restoration of property loss, of damaged human relations, and a victim's emotional restoration. Braithwaite’s vision for restorative justice is a “radical redesign of legal institutions” and “regulating injustice restoratively.”

Conceptual expansion takes another form. Some commentators use restorative justice as the single term to encapsulate emergent, and quite varied, justice forms and practices. This is exemplified in a review essay by Menkel Meadow (2007), in which restorative justice is used as an umbrella concept to refer not only to mediated meetings between victims and offenders (and others) but also to contemporary forms of indigenous sentencing practices and problem solving courts. Meadow also claims that restorative justice “helped form a new field of international law and political structure: transitional justice.”

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153 Ibid.

154 Supra note 128 at 63.


156 Ibid.
Menkel Meadow begins by saying that practices associated with restorative justice ideally have “four R’s of repair, restore, reconcile, and reintegrate. Later Meadow says that these elements are seen in problem solving courts, which use “restorative principles,” “more reparative sentences,” and are “specialized reparative courts.” This is inaccurate. There are some affinities between restorative justice, Indigenous sentencing courts, and therapeutic jurisprudence (the last being associated with problem-solving courts). However, they are distinctive, and merging them as one type of justice creates confusion and incoherence.

6. DERIVING PRECISE “KEY TERMS” IN RESTORATIVE JUSTICE

There may be a way to make sense of analysts’ varied uses of key terms in domestic contexts of restorative justice by observing that their start points differ. Some identify repairation as the master term; others, restoration; others, making amends; and still others, a combination of these. Further, the ‘terms’ can be used in different ways, depending on whether the author explicitly considers their relationship to conventional criminal justice.

For Sharpe (2007), repairation is the master term, within which there is material reparation and symbolic reparation, which may overlap. Material reparation generally addresses “the specific harms... while symbolic reparation speaks to the wrongness of the act.” The former includes restitution (the broader term referring to return of property or compensation i.e., monetary payment in lieu of return or repair of property). Symbolic reparation refers mainly to an apology, but as Sharpe understands the term, it is also “expressed” by buying a gift, doing community service, or entering a treatment program. Others such as Marshall (1998) use ‘reparation’ as the master concept, but without drawing distinctions among terms such as compensation or community service.

157 Ibid.

Restoration is the master term for Braithwaite (2002), Duff (2002), Walgrave and Strang (2002), among others, but the scope and elements of restoration vary, and except for Duff, the elements are not clearly specified. With restoration as the master term, Duff views reparation and compensation as subsidiary activities that may assist in moving a victim to an initial state before the crime; a sincere apology may address the "wrong," but can be given added force with other actions. Other writers, such as Strang (2002), focus mainly on an apology as a source of emotional restoration.

Making amends is the master term for Von Hirsch, Ashworth, and Shearing (2003), who focus on a "negotiated process between offender and victim" (also termed a "moral dialogue"), which leads to the offender's "acknowledgment of fault and the undertaking of a reparative task." The reparative task should recognize the victim's status as a wronged individual and express a "regretful stance." The model assumes an imposition on an offender, which includes "adverse judgments" and loss of property or time by paying compensation or undertaking a task. An amends model is also used by van Ness and Strong (2006), but they focus on the harm caused by crime, more so than a victim's status as a wronged individual.

Dignan (2003) uses a combination of master terms in identifying restorative justice as a "replacement discourse" in his systemic model of criminal justice, conceptualized as an enforcement pyramid, building on Braithwaite (1999). At the base are minor property or assault offenses, and their handling is similar to von Hirsh, Ashworth, and Shearing's (2003) making amends model: reparative undertakings are agreed to in an informal restorative justice process, which demonstrate "respect for the rights of others." The next level in the pyramid addresses cases that go to court because victims do not want to participate, suspects deny guilt, and the parties cannot agree on reparation outcomes. Court sentencing would be limited to imposing a "restoration order" which may be compensation, reparation for the victim or community service. The next two levels up the pyramid involve more serious cases and repeat offenders; these would attract court sentences of "restorative" punishment, and ultimately, incapacitation.
7. **UNITED NATIONS’ VERSION OF RESTORATIVE JUSTICE**

Restorative Justice is a problem-solving approach to crime which involves the parties themselves (both victim and offender) and the community generally, in an active relationship with statutory/justice agencies (Marshall 1996). Restorative Justice may be seen as criminal justice embedded in its social context, with the stress on its relationship to the other components, rather than a closed system in isolation which can be understood with the help of the following diagram:-

![Diagram of Restorative Justice]

Restorative justice is an approach to problem solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies and the community (i.e., a wider society). Restorative justice programs are based on the fundamental principle that criminal behavior not only violates the law, but also injures victims and the community. Any efforts to address the consequences of criminal behavior should, where possible, involve the offender as well as these injured parties, while also providing help and support that the victim and offender require.


160 The working party of the UNO on “Restorative Justice” adopted the definition submitted by Tony Marshall, of the British Home Office.
Restorative justice refers to a process for resolving crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of that conflict. Participation of the parties is an essential part of the process that emphasizes relationship building, reconciliation and the development of agreements around a desired outcome between victims and offender. Restorative justice processes can be adapted to various cultural contexts and the needs of different communities. Through them, the victim, the offender and the community regain some control over the process. Furthermore, the process itself can often transform the relationships between the community and the justice system as a whole.\(^{161}\)

Restorative justice is a way of responding to criminal behavior by balancing the needs of the community, the victims and the offenders. It is an evolving concept that has given rise to different interpretation in different countries, one around which there is not always a perfect consensus. Also, because of the difficulties in precisely translating the concept into different languages, a variety of terminologies are often used.\(^{162}\)

There are many terms that are used to describe the restorative justice movement. These include “communitarian justice”, “making amends”, “positive justice”, “relational justice”, “reparative justice”, “community justice” and “restorative justice”, among others.

More specifically, restorative justice practitioners tend to agree that what truly makes a particular response to crime a “restorative” one is not so much a specific practice or process, but rather its adherence to a set of broad principles that provide a common basis for the participation of parties in responding to a criminal incident and its consequences. The principles of restorative justice programs have been stated in a number of different ways, but essentially contain the following key elements:

\(^{161}\) Ibid.

\(^{162}\) Id at 7.
8. **PRINCIPLES OF RESTORATIVE JUSTICE**

Three key principles govern implementation of restorative justice in processes and in systemic reform. Let us consider each of these in turn.

**Principle 1. JUSTICE REQUIRES THAT WE WORK TO HEAL VICTIMS, OFFENDERS, AND COMMUNITIES INJURED BY CRIME.**

Crime leaves injured victims, offenders, and communities in its wake, each harmed in different ways and experiencing correspondingly different needs. To promote healing, restorative justice must respond appropriately, considering the needs and responsibilities of each party.\(^{163}\)

**Victims’ Perspectives**

Victims are those who have been harmed by the offender; this harm may be experienced either directly or secondarily.\(^ {164}\) Primary victims are those against whom the crime was committed, may sustain physical injury, monetary loss, and emotional suffering. These may be only temporary, may last a lifetime, or may cause death. Secondary victims are indirectly harmed by the actions of offenders. These victims may include family members, neighbors, and friends of primary victims and offenders. Victimization is, thus, the experience of being wronged by another; it brings with it the need for vindication: an authoritative and decisive denunciation of the wrong and exoneration of the one who was wronged.\(^ {165}\) In order to construct a restorative response to crime for the victims, their injuries and needs must be taken into account.

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**Offenders' Perspectives**

The injuries of offenders must also be addressed. These injuries may be physical (as when the offender is wounded during the crime or incarcerated as a result of it), emotional (as when the offender experiences shame), or moral and spiritual (because the offender has chosen to harm another). Further, offenders will likely be injured as a result of the criminal justice system's response, which further alienates them from the community, strains family relationships, may lead to long-term employment disadvantages, and may prevent them from making amends to their victims. These injuries should be acknowledged and addressed in the response to crime to prevent recidivism.

**Community Perspectives**

In order to consider the injuries and needs of the community—and, more importantly, there is a need to be clear about what we mean by "community." This term is used in different ways. Sometimes it refers to a geographic location—the neighborhood in which the victim or offender lives, or in which the crime took place—a "local community." With increased mobility and transience, however, a more useful definition might be non-geographic, emphasizing the presence of connectedness and relationships: a "community of care." Sometimes the word is used loosely in everyday conversation as a synonym for civil society as a whole.

Each of these types of communities—the geographic community of the victim, offender, or crime; the community of care; and civil society—may be injured by crime in different ways and degrees, but all will be affected in common ways as well: the sense of safety and confidence of their members is threatened, order within the community is threatened, and (depending on the kind of crime) common values of the community are challenged and perhaps eroded. However, the injury to the first two communities is far more direct than the general injury to civil society.

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Principle 2. VICTIMS, OFFENDERS, AND COMMUNITIES SHOULD HAVE THE OPPORTUNITY FOR ACTIVE INVOLVEMENT IN THE JUSTICE PROCESS

Virtually every facet of our criminal justice system works to reduce victims, offenders, and communities to passive participants. Because the government is considered to be the primary victim, its virtual monopoly over the apprehension, prosecution, and punishment of offenders seems logical and legitimate. Because victims are not parties of interest in criminal cases, and rather are simply "piece[s] of evidence to be used by the state to obtain a conviction," they have very limited control over what occurs and no responsibility to initiate particular phases of the process. Finally, the direct participation of members of the community is also very limited, consisting almost exclusively of service on grand or petit juries or as witnesses.

Restorative justice, on the other hand, places a much higher value on direct involvement by the parties. For victims who have experienced powerlessness, the opportunity to participate restores an element of control. For an offender who has harmed another, the voluntary assumption of responsibility is an important step in not only helping those who were hurt by the crime but also in building a pro-social value system. Likewise, the efforts of community members to repair the injuries to victims and offenders serve to strengthen the community itself and to reinforce community values of respect and compassion for others.

169 The justification given for the exclusion of the victim from prosecution scene is stated that the crime by and large is directed against the society as a whole and the state which has taken upon itself to protect the life; liberty and property of individual exercise the police power and its justice delivery system. It is also bound to restrain the individual from taking law into his own hands. Another reason forwarded is that the intervention of victim in prosecution process may vitiate the fairness of trial and open the door-way to retributive and vengeful traits that may vitiate fair trial.
Principle 3. THE RELATIVE ROLES AND RESPONSIBILITIES OF GOVERNMENT AND COMMUNITY: IN PROMOTING JUSTICE, GOVERNMENT IS RESPONSIBLE FOR PRESERVING A JUST ORDER AND THE COMMUNITY FOR ESTABLISHING A JUST PEACE.

Peace requires a community's commitment to respect the rights of its members and to help resolve conflicts among them. It requires those members respect community interests even when they conflict with 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. Order, on the other hand, is imposed on the community. It establishes and enforces external limits on individual behavior to minimize overt conflict and to control the resolution of conflict. Both order and peace are appropriate avenues for achieving safety. However, as imposed order increases, personal freedom decreases; hence, peace will be sought in a society that values freedom. Security built primarily on governmentally imposed order is detrimental to a free society, as conditions in police states throughout the world demonstrate.

Describing peace as the community's responsibility and order as government 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 wish to emphasize a point that is often forgotten in the debate about crime and criminal justice: safety comes as both government and community play their parts in upholding order and establishing peace.

173 Ibid.
9. **PRECISE KEY ELEMENTS IN RESTORATIVE JUSTICE**

Having analyzed the restorative justice as unleashed and interpreted by various scholars and jurists the key elements of this system globally must be as follows:-

(a) **Supporting and assisting victims.**

The restorative justice model can support a process where the victims’ views and interests count, where they can participate and be treated fairly and respectfully and receive restoration and redress. By participating in the decision-making, victims have a say in determining what would be an acceptable outcome for the process.

(b) **Repairing of relationship.**

A key feature of restorative justice is that the response to criminal behavior focuses on more than just the offender and the offence. Peacemaking, dispute resolution and rebuilding relationships are viewed as the primary methods for achieving justice and supporting the victim, the offender and for interests of the community.

(c) **Denouncing criminal behavior.**

Denunciation is achieved in a more flexible manner, taking into account not only the rules, but also the individual circumstances of the offence, the victim and the offender. It is designed to be a positive denunciation within a larger process, rather than being the sole focus of the intervention.

(d) **Encouraging responsibility.**

The restorative process is meant to make it easier for offenders to assume active responsibility for their behavior and its consequences. A restorative process moves from merely assessing legal guilt to attempting to determine responsibility for a conflict and its consequences. This has the effect of broadening out the process beyond the specific incident, victim and offender. The manner in which this responsibility will lead to action, in particular apologies and restoration, is left to be determined through the process itself and not through the automatic application of some general legal rules.
Focused restoration.

Rather than emphasizing the rules that have been broken and the punishment that should be imposed, restorative approaches tend to focus primarily on the persons who have been harmed. A restorative justice process does not necessarily rule out all forms of punishment (e.g. fine, incarceration, probation), but its focus remains firmly on restorative, forward looking outcomes. The restorative outcome that is being pursued is the repair, as far as possible, of the harm caused by the crime by providing the offender with an opportunity to make meaningful reparation. Restorative justice is relationship based and strives for outcomes that satisfy a wide group of stakeholders.

Reducing recidivism

The past behavior of individuals and its consequences are clearly a central preoccupation of the restorative process, but so is the offender’s future behavior. An offender’s undertaking as it relates to his or her future behavior is usually an essential component of agreements arrived at through mediation or other restorative processes.

Transforming or “reforming” the offender through the restorative process is a legitimate objective of the process and so is the prevention of recidivism. The insistence that offenders understand and accept responsibility for the consequences of their actions is clearly meant to affect the offenders’ future behavior. It is understood that the community and statutory agencies have a role to play in this process.


Ibid.

Anne L. Schneider and Zehr (1990), Deference and Juvenile Crime: Results from a National Policy Experiment, New York: Springer, Verlag, p-43.

10. Stakeholders in Restorative Justice

McCold and Wachtel\textsuperscript{179} have given the structure of stakeholders applicable in the process of restorative justice. This structure distinguishes the interests of the direct stakeholders, those most affected by a specific offence, from those indirectly affected as shown in figure given below.

The principals, victims and offenders, are the most directly affected, while their family and friends who comprise their 'community of care' are also directly affected. Then there are indirect stakeholders who live nearby or who live in the wider society. The injuries, needs and obligations of direct stakeholders are different than those of the indirect stakeholders.

All of the direct stakeholders need an opportunity to express their feelings and have a say in how to repair the harm. Victims are injured by the loss of control they experience as a result of the offence. Victims need to regain a sense of personal power. This empowerment is what transforms victims into survivors. Offenders damage their relationships with their own community of care by betraying trust. To regain that trust, they need to be empowered to take responsibility for their wrongdoing. The community of care, those who have an emotional connection with a victim or offender, such as parents, spouses, other family members, teachers, employers and others, meet their individual needs by ensuring that something be done about the wrong, that the wrongfulness be acknowledged, that constructive steps are being taken to prevent further offending, and that victims and offenders be reintegrated into their communities.

The indirect stakeholders, those who are not emotionally connected to the principals but who live nearby or are members or officials of government, religious, social or business organizations whose area of responsibility includes the place or people affected by the incident, must not steal the conflict by usurping the responsibilities of those directly affected. These indirect stakeholders have a responsibility to support and facilitate processes in which the direct stakeholders determine for themselves the outcome of the case. Such processes will reintegrate both victim and offenders, build problem solving communities and strengthen the civil society.

183 Ibid.
184 Ibid.
11. CONCLUSION

It is generally acknowledged that 'a primary purpose' of the restorative conference is the “re-empowerment of the victim.” Restorative justice is centrally concerned to undo the victim incapacitation inscribed in the criminal justice system and to rehabilitate the victim as a key factor in society's response to the criminal episode. However, in the restorative justice paradigm, it is not enough to make the extant of criminal justice system victim-friendly. Victim empowerment means transforming the victim into an agent of the restorative process. The idea is to endow the victim with a ‘party interest’ in the offence and with 'standing' to participate in its resolution.

Indeed, its advocates understand that the success of the entire restorative justice project rests crucially upon the extent to which the victim is afforded the opportunity to become a genuine party to the process. They also accept, however, that victim empowerment proper will have to occur despite the state. In this regard victim empowerment entails a radical corollary, namely, the disempowerment of the state. There is a relationship of inverse proportion between victim empowerment and the role of the state in the criminal justice system. Progress for the one entails regress for the other.

This is a crucial insight. It is an insight that founds the theorization of the criminal episode as a private conflict. This privatized notion of crime may be understood as a victim empowerment strategy. Scholars of restorative justice have identified the state as the source of the powerlessness of crime victims. They consider that re-humanizing the criminal justice system means privatizing our concept of crime. It is because the state has converted crime into a public matter that the private concerns of the victim have been severely neglected. Restorative justice seeks to acknowledge and accredit the real, individual victim of each crime, and to repair the damage that the crime has done to that particular person. A public concept of crime, which casts the state as generic victim, is unable to accommodate such an agenda. Criminal justice needs a passive victim. Restorative justice demands an active one. Hence the campaign for the private concept of crime.
The learned scholars of restorative justice see victimhood as a status that is acquired unwillingly, but which need not be calamitous. They consider that within the restorative context it can be transformed into a trigger for regeneration. Victimhood under the criminal justice system is an alienated state. Restorative justice aims to overcome this alienation, by involving the victim in a process that is properly responsive to the condition of victimhood. In a word, restorative justice seeks to make a virtue of victimhood. In the restorative paradigm, victim empowerment is more than just giving the crime victim a role in the criminal justice system. It is really about reconstructing that system in such a way that it cannot function without the cooperation of the crime victim.

Restorative justice is magnanimous. It is concerned not only to repair the damage that the offender has caused to the victim and the community. It is concerned also with the welfare of the offender himself and to deliver him from the clutches of a criminal existence. The offender is important, not as passive recipient of an imposed punishment, but as co-agent of the restorative process and co-author of the restorative sanction for the purpose of eliminating/reducing the “recidivism.”