

Restorative Justice: Rebirth of an Ancient Practice

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Wayne Northey

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Restorative Justice: Rebirth of an Ancient Practice

by Wayne Northey

Introduction

Two hundred years ago, Gotthold Ephraim Lessing wrote *Die Erziehung des Menschengeschlechts* (The Education of the Human Race) in which he posited a gradual improvement of the human race from barbarity to utopian qualities. Since Darwin's *Origin of the Species* some have postulated a "social Darwinism" which presumes that each social institution is better than the one it replaced.

All such notions are false, or at least misleading.

I remember once discussing the philosophical basis for Canada's current prison system with a prison administrator, who without hesitation suggested that what we have today must be the best because it simply is.

Rather than any notion of an inexorable linear advancement of civilization, or of social Darwinism, let us more modestly think of slowly evolving social institutions that may or may not improve upon what was in place before. As with humans, social systems and institutions change slowly. The changes may be for good or for ill. Only time will reveal the outcome.

For example: In ancient Greece, the goddess Justice was presented as a smiling young maid with a friendly look; the blindfolded goddess Justice with a sword in her right hand was invented much later. These two symbolize very different realities of justice.

Another example: Since the 11th century, the central biblical notion of justice was said to be, "an eye for an eye." This led to a depiction of God

as an angry deity, like a feudal lord, demanding blood satisfaction for the sins of his people. A doctrine of the atonement arose from this. Legal historian Herald Berman says this "biblical" understanding of justice has dominated Western criminal law since the theologian Anselm first propounded it in *Cur Deus Homo* (Why the God-Man?). This understanding permeated both secular and religious expressions of law in the West (Berman, 1983, p. 174ff).

But many biblical interpreters have challenged this view of the atonement. They assert that the primary goal of biblical justice is *not retribution*, but *shalom*. This Hebrew word is rich with connotations of well-being, "okayness," peace, harmony, restoration. Jesus taught that one recognizes the tree by its fruit. If the fruit of justice is not *shalom*, justice has not been done. Justice is peacemaking according to the dominant justice themes of the Bible (Northey, 1992).

In *Changing Lenses: A New Focus for Crime and Justice*, Howard Zehr suggests that humans understand reality through a variety of "paradigms" or "lenses" (1990, p. 83ff). In the realm of scientific inquiry, prior to the 17th century, the Ptolemaic world view reigned supreme. This paradigm included the belief that the earth was the centre of the universe and that the planets revolved around it. It was simply common sense, what one author calls the "plausibility structure," against which all scientific truth was measured (Newbigin, 1990, p. 53ff).

But a scientific revolution in the 17th century created an entirely different picture of the universe. The new Newtonian world view dominated until the 20th century. It became the new plausibility structure, the common sense view everyone simply knew.

In this century, Einstein has been the most influential intellectual to make us rethink the scientific structure of reality. The Newtonian view is proving inadequate in some realms of physics as well as in areas of psychology and spirituality.

Each time the scientific world view changed, there was a "paradigm shift" as Thomas Kuhn coins it in *The Structure of Scientific Revolutions* (1970).

Zehr applies this concept to changes or shifts in our understanding of crime and appropriate responses. In the West, two primary shifts have occurred:

1. The rise of public justice.
2. The rise of the modern penitentiary as the primary punishment for crime.

The assumption made by my prison administrator friend, and by many others, is that these two changes were improvements upon earlier, more primitive, less civilized responses to crime. But were they? Historical research in most cultures, including Western culture, reveals that restitution was often the norm even in the most violent crimes (Wright, 1991, p. 1ff). The pervasive use of the prison is not necessarily the best response to crime simply because it is the most recent!

Likewise, private or community justice was not necessarily more barbaric, nor less just than today's vast state-run justice bureaucracies.

Let us put aside our assumptions and look more closely at the phenomenon of "restorative justice." The many scientific paradigm shifts make us wary of holding out for only one way of understanding the nature of nature — or of criminal justice. Likewise, we should be suspicious of any alternative vision of justice if it claims to be some kind of ultimate paradigm.

More modestly, I suggest we look at some of the pros and cons of restorative justice as a different lens through which to view crime. How does justice look seen through this lens? This is no longer a theoretical question. In the past 20 years, program models of restorative justice have proliferated around the world.

Two years ago, 41 academics presented papers at an international conference on restorative justice. The papers were collected into a volume entitled *Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation — International Research Perspectives* (Messmer and Otto, 1992). In much of this presentation, I will draw on material in this publication.

1. What is Restorative Justice?

What is the representative retributionist model? "In classical penal law, retribution is the primary response. In consciously inflicting pain on the offender, there is an attempt to re-establish the upset equilibrium of the judicial order... (Walgrave, 1991, p. 5)."

What is the classic restorative justice model? "In the restorative justice paradigm..., in the foreground is the reparation of the harm done. The kind of harm can as easily be material as mental or social. The victim can as easily be an individual as the community (Walgrave, 1991, p. 5)."

The new ingredient in this concept is *reconciliation*: a truly revolutionary idea in modern criminal justice system practice and theory. Reconciliation means peacemaking: bringing victim and offender to the point where the natural enmity between them as a fallout from the crime has been superseded by a new relationship where the enmity has ceased.

"The concept of restorative justice is simple. The scales of justice are no longer seen as balancing the harm done by the offender with further harm inflicted on the offender; that only adds to the total amount of harm in the world. Instead, the harm is balanced by offering support to the victim and requiring the offender to make amends, with help from the community if necessary. Stated in this way, the idea appears attractive, even self-evident; a succession of surveys have [*sic*] indeed found up to 80% or 90% of those questioned supporting [such] ideas... (Wright, 1992, p. 525)."

The dominant Western model of crime response has been retribution, what one criminologist calls retaliatory dentistry — an eye for an eye, a tooth for a tooth (Bianchi, 1973). This model of crime response developed slowly over the centuries throughout Western culture. It was a move away from a community or private justice response, which saw crime as primarily a violation of the victim. Instead, crime came to be viewed as violation of the state. It was also a move away from a response in which some form of compensation or amends-making was called for between the victim and the offender. Instead, under state control, crime became an act demanding punishment by the state.

The prison and penitentiary system became the primary punishment apparatus of the Western state. But when it proved to be devastating to the clientele, harming not only the body but, as Michel Foucault argued, skewing the very soul of the offender (Foucault, 1979), various rehabilitation goals emerged. In fact, one could accurately say that the two dominant goals of Western criminal justice during the past 200 years have been retribution and rehabilitation. (Often deterrence is added.) Often, these goals intertwined in theory and practice. And rehabilitation was often subsumed under retribution. In juvenile justice, the goal of rehabilitation sometimes stood apart from retribution, but more often was combined with it. No other goal was seriously propounded or pursued by professionals.

The emergence of restorative justice theory and practice in the past two decades is a significant departure from the dominant goals of the past 200 years. One theorist says: "It is therefore important to accept the thesis that the restorative justice approach does not constitute a variation of penal justice, nor of rehabilitative models, such as some theorists wrongly think... Restorative justice is conceived in principle as a third way in its own right... Only a precise delineation of this will be adequate to prevent it from being rerouted towards one of the two other current theories (Walgrave, 1991, p. 6)."

Restorative justice theorists and practitioners are insistent that this is a third way of crime response, not to be confused or meshed with either of

the other two responses. To the extent that this is done, its thrust and its power are lost.

Restorative justice is a peacemaking response to crime, and a critique of criminology as a military science. It does not counter a harm done by a new harm, but with a healing response to victim, offender and the wider community. If restorative justice practice has educational and rehabilitative spinoffs, these are good but secondary goals to restoring the brokenness arising from the criminal act. In biblical language: "Do not be overcome by evil, but overcome evil with good (Romans 12:21)."

2. The Pros and Cons of Retribution

Pros

The Western retributive system is predicated on the centrality of justice or due process, predictability, procedural rectitude, protection of the rights of the defendant and strict adherence to established rules. "Insofar as these are the major considerations the system is as perfect an instrument for carrying them out as has been imagined," one author comments (Marshall, 1985, p. 156).

Arguably, the British common law system, from which the Canadian criminal justice system has grown, is one of the finest, most efficient and trustworthy systems in the world.

On a larger, more philosophical scale, the main good of the retributive system, according to another author, is its symbolic undergirding of existing social morals and basic values. He believes that the restorative justice paradigm cannot replace this task, for by definition it focuses on individuals in personal conflict (Bussman, 1992, pp. 317-326). He says: "For this reason, it appears unrealistic to expect that mediation can be established as a real alternative to criminal law. This is because it does not symbolize essential social norms and values in the same way. The

substance of a mediation is the conflict between the parties, not a breach of a criminal law (Bussman, 1992, p. 321)."

I shall return to this idea of Bussman in the conclusion. However, restorative justice is in fact an attempt to displace retributive justice in favour of peacemaking alternatives.

Cons

There is much criticism in the media and by the public of the criminal justice system in Canada, criticism of disparities in the treatment of offenders, the excessive and inconsistent use of discretion, the bias toward pursuing and punishing the "underdog" vs the "white-collar" criminal, the system's adversarial nature, the incongruence between the punitive and rehabilitative goals, its leniency, etc. (Bussman, 1992, p. 11 with additions).

But these are perhaps more problems of process, and may be corrected to a point.

I agreed earlier with the common assessment that the Canadian criminal justice system is second to none in the world. Lest this be taken as an endorsement, I will add a rider: *If one ignores the wider philosophical goal of the criminal justice system.* This goal is punishment. Though rehabilitation and deterrence are often included in the goals of the current system, in reality, these goals are subsumed under the primary goal of punishment.

During the last parliamentary debates in Canada on capital punishment, a popular slogan by the opposing side was: "Why kill people to teach people that killing people is wrong?" This slogan builds upon a fundamental *non sequitur*.

There is also a common proverb that asserts: Two wrongs do not make a right.

In spite of the self-evident nature of these sayings, the entire criminal justice system is predicated upon an opposite view which believes in the effectiveness of punishment, or of "pain delivery" as one author expresses it (Christie, 1981). The State in effect says: Don't do as I do, do as I tell you. But one may ask: How can renouncing the use of force and violence be taught by using force and violence? Does the state magically do right by doing what everyone knows to be wrong — and by doing what it also says is wrong? The title of an American psychologist's book rings true: *The Crime of Punishment* (Menninger, 1969).

Two criminologists assert: "Over the past 200 years, the whole subject of criminal law and criminology may be summed up as a search for a satisfactory solution to the problem of the goals of punishment (Paliero and Manózi, 1992, p. 231)." Restorative justice declares: This search will always result in failure.

In the end, the only justification for punishment is infliction of pain — the very action, of course, the entire justice apparatus is supposed to counter! It is as if, in its haste to put out a fire at an oil well, the fire-fighting crew connected the hoses to oil barrels, and began spraying the liquid at the conflagration. The result is simply a greater inferno.

In Hans Christian Andersen's *The Emperor's New Clothes*, the kings' attendants, thanks to the straightforward observation of a child, discover that the emperor was in fact naked. Instead of doing the obvious — stopping to help clothe the Emperor — they continued the charade. Keeping up appearances, "saving face" was more important than admitting the truth.

The greatest objection to the punishment goal of our criminal justice system is simple: It doesn't work according to its own goals of retribution, rehabilitation and deterrence. Nor does it begin to address restorative justice goals: the victim is not healed, the offender does not make amends, the wider community continues to live in fear.

Criminologist John Haley writes: "The United States and perhaps most other industrial states seem locked into a contrary counterproductive model for the treatment of offenders. The prevailing emphasis is to punish or to incapacitate offenders. The result is a spiral in reverse, with an increasing number of persons sentenced to prison who upon release swell the population of offenders as they are even more likely than before to continue to engage in socially deviant behavior, their experience in prison enabling them to be even more proficient (1992, p. 118)." Thomas Mathiesen draws on international research to conclude, concerning the use of the prison in response to crime: "The prison does not have a defence, the prison is a fiasco in terms of its own purposes (1990, p. 137)."

More ominously, Nils Christie warns in his new book, *Crime Control as Industry* that the United States in particular, and the rest of the West under its influence, are moving toward a Western style of "Gulag" as terrible as anything in the former U.S.S.R., and approaching the concentration camps of the Nazi era — all democratically instituted. He writes: "Germany was able to do it, to reach a final solution in the middle of a war, ... The USSR was able to develop Gulags in the midst of preparations for war, and to run them during and after it. They were not only able to do so, but benefitted from the arrangements. Why should not modern, industrialized nations be even more successful?"

[...]

"The ground has been prepared. The media prepare it every day and night. Politicians join ranks with the media. It is impossible politically not to be against sin. This is a competition won by the highest bidder. To protect people from crime is a cause more just than any. At the same time, the producers of control are eagerly pushing for orders. They have the capacity. There are no natural limits. A crime-free society is such a sacred goal for many, that even money does not count. Who asks about costs in the middle of a total war (Christie, 1993, p. 167)?"

He says again: "Yet this [control system] is above criticism. It has none of the grave illegalities about it that marked the Holocaust or the Gulags. Now it is democratic crime control by the voting majority. To this there are no natural limits, as long as the actions do not hurt that majority (Christie, 1993, p. 173)."

Haley says: "The results [of punitive sanctions] are apparent. Crime rates increase and, increasingly fearful and without compensation, control, or cure, victims and the public at large tolerate less discretion and demand more punishment. Each year a high percentage of the American public attributes crime to lax punishment and lenient courts and seeks further penalties as 'the most important thing that can be done to reduce crime.' With over half of all felony defendants in the U.S. having at least one prior conviction... U. S. prisons are producing nearly as many criminals each year upon release as there are first-time offenders. Thus the spiral continues (Haley, 1992, pp. 118-119)."

Another writes: "Every expression of force in penal law is in effect an expression of powerlessness. The community has not succeeded in motivating certain of its members towards conformity, nor of offering victim or offender a constructive possibility of reparation. All penal justice deprivations of liberty constitute by this act more a defeat for a society which claims to protect individual freedoms than a victory of law (Walgrave, 1991, p. 9)."

Punishment as the goal of justice is philosophically and in practice without justification. The only rationale for punishment is punishment. Our prisons daily demonstrate the failure of this response to crime.

3. The Pros and Cons of Restorative Justice

Pros

Obviously, I believe in this approach to criminal justice. Seventeen years ago, when I first worked with the prototypical *Victim Offender*

Reconciliation Program in Kitchener, Ontario, I would have said that I was a believer because the *theory* sounded so right. Today I argue that the theory makes as much sense as ever, but as importantly, hundreds of programs throughout the world demonstrate the viability of restorative justice.

Here are some pros:

1. Restorative justice is conceptually a genuine, common sense alternative to the retributive justice approach. It strikes a deep chord within, because it seems so right. "The basic assumptions of the reconciliatory idea are that equal weight should be given to the interests and needs of victims, offenders, and the community, and that relationships should be reaffirmed and reconstructed, not broken even further (Marshall, 1992, p. 24)."

Numerous studies have shown that a high percentage of people, when they understand the goals of restorative justice as an alternative to prison, are in favor of using this alternative (Bae, 1992, pp. 291-307; Hudson, 1992, pp. 239-276)¹.

Numerous international studies of programs reflecting the restorative justice approach reveal a fairly high level recorded of achievement of its aims:

- a. Sixty percent of all victims and nearly all offenders agree to the mediation option. More than 40% of all referrals result in a meeting.
- b. More than 80% of mediated cases lead to successful agreements. More than 80% of agreements were fulfilled. In British Columbia, the fulfillment rate has been close to 100%.

1. See Appendix A for a comparison of the two approaches to justice.

- c. Recidivism rates are usually lower for offenders who go to mediation than for offenders who went to prison. A recent study completed in four mediation sites with more than 1,100 victims and offenders demonstrated a considerable reduction in amount and severity of juvenile crime after one year, compared with a similar group of offenders who were not involved in mediation. (Umbreit and Coates, 1992, p. 20).
 - d. Material loss and reparation became less important than relational aspects, pointing to an experience of some level of reconciliation by many victims and offenders. (Marshall, 1992, pp. 19-21).
2. Humanistic and religious teaching concur that an evil is best responded to not by evil, but by good. "It is better to give preference to the reparation of a wrong by the obligation to make right. Whoever causes a harm must repair it or make amends... The infectious and human motivations of reparation, reconciliation and forgiveness are socially more constructive than the use of force, hatred and vengeance. They contribute more toward harmonious social life as well as toward communal liberation (Walgrave, 1991, p. 9)."
 3. Forgiveness is a powerful psychological force which may be directed toward release and healing for the victim at least. It has no place in the current justice system. But it may be used in a restorative justice model.

This letter from a husband of a rape victim extols the healing brought to the family by a mediation process with the rapist:

June 13, 1992

*Victim Offender Reconciliation Project
Langley, British Columbia*

ATTENTION: Mr. Dave Gustafson

I have, for quite awhile now, attempted to state in the form of a letter, my appreciation to you and your program for the benefit my family has realized as a result of your efforts.

The problem I've had in doing this has been the inadequacy of even the most extreme adjectives to describe my feelings regarding the value of what we have received.

Outstanding, overwhelming, wonderful, marvelous, priceless and great are all words that I've used, but still they fall short of describing the results which we have been the beneficiaries of.

The concept on which your program is based and the genuine care with which you administer it deserve more praise than any of these words can relate.

Upon first being told of the program, I was originally skeptical, and afraid that there was potential for more harm than good from putting my wife's healing to some degree in the hands of the offender.

However, because of the way these matters are handled with care and understanding by you and your staff, not only were my fears erased but I have become convinced that your program is of enormous value to society in general.

I had to deal with my feelings toward the offender, which was that he should be confined and punished forever, and any talk of his healing stuck in my craw. I now realize that offenders do eventually rejoin society and if healing on his behalf has not been achieved then there is a good chance of more harm being done.

Also, it has become clear to me that most offenders are themselves victims and that some of their victims go on themselves to become offenders. The cost of this cycle to society is astronomical and

therefore the value to society of breaking the cycle is also astronomical.

In the case of our family before your intervention, we were on a course fast heading for destruction at the expense of our children and the mental and emotional health of my wife and I.

Now, we are a much more healthy family. My wife has peace of mind and we are raising our children in a way that should make them contributors to society in the future.

Your vision, understanding and caring is a breath of fresh air threatening to bring humanity out of the dark ages of the adversarial system.

I thank you from the bottom of my heart and will work to support you and further your efforts in the future.

Sincerely...

4. The best qualities of offenders are called forth, rather than highlighting only their worst qualities.
5. Crime prevention policy is integrated with social policies. "This would embrace not only the restorative principle but also the recognition that crime prevention should be primarily an aspect of social rather than criminal policy and should be based on general incentive rather than general deterrence. The tendency in history has been towards the abolition of cruel, inhuman and degrading punishments: crucifixion, branding, mutilation, corporal punishment, capital punishment. This is not only because of humanitarian concern for the offenders who were the victims of such punishments but also because of the harmful effects on the states that inflicted them and the societies that tolerated them (Wright, 1992, p. 538)."

6. Victims are directly involved in the system, but are not burdened with decisions about punishment.
7. Offenders are active, not passive, participants.
8. The community's involvement is heightened, especially where the sense of community is weak.
9. In cases of wrongful conviction, which may be as high as 10% in serious and violent crime (McCloskey, 1991, p. 1), severe punishments would not compound the wrong done to such a person.

"There is therefore a whole range of ethical, juridical, psychological, and social principles which serve as motivation and cry out for a judicial reaction toward transgression of the norm in which the accent falls on the dynamic of reparation more than upon punishment or even rehabilitative treatment (Walgrave, 1991, p. 10)."

Some additional considerations:

1. The success rates of these programs are similar to each other, based upon studies in several countries, and come close to meeting their primary goals.
2. These programs have more problems, not with the victims and offenders and wider community who are their clientele, but with the criminal justice system itself, which constantly acts in an adversarial fashion, or threatens to co-opt restorative justice to retributive ends. Ironically, "[Mediation] is a practice that contains the seeds for solving a new problem — the inadequacy of the criminal justice system itself,... (Marshall, 1992, p. 26)."
3. Prison overcrowding is alleviated by restorative justice practice. In the United States, this is considered to be the most critical problem in criminal justice today!

4. "Mediation can act as an effective critique and work for a positive change in community awareness, collective responsibility and societal development. But in order to do so it has to ward off the conservative bureaucratic attitudes, maintain a firm ideological base and mode of operation to which it strictly adheres, be active and visible in its critique and attack aggressively the forces that inherently work against change in society (Grönfors, 1992, p. 428)."

Restorative justice moves justice from an offense against an abstract entity known as the "Queen" or the "state" to a potentially fully human encounter between victim, offender and community, so that all significant characteristics of the criminal experience may be addressed adequately. Restorative justice invites a full human response to crime, rather than the "right" rules of an abstract legal code being applied to the "right" crime in the "right" way. The fruit called restoration, not the tree of abstract process, is the supreme goal.

Cons

1. There are many concerns about restorative justice. Perhaps the greatest is that of "net-widening." In some studies of restorative justice programs, there is indication that the net of social control is not only widened, but there is also increased reincarceration and imprisonment. This stands in direct contradiction to the purposes of restorative justice.

For many practitioners and researchers, net-widening seems to deaden the gains of restorative justice.

An alternative perspective is that for victims of crime, this phenomenon has helped to bring healing to cases where otherwise the victim's needs would be entirely overlooked by the system.

(Of course, the rise of victim advocacy groups signals that some needs, especially of a material nature, are met. Nonetheless, the

deeper psychological needs go unaddressed in some victims' groups whose *raison d'être* is vengeance toward the offender, rather than healing for all concerned. If it is true, as some researchers are indicating, that forgiveness is essential in cases of deeply unresolved trauma (Fitzgibbons, 1986, pp. 629-633; Gehm, 1992, pp. 541-550), then victims finally must embrace forgiveness and restoration for their own healing. Gehm says: "Yet forgiveness lies at the very heart and center of processes for overcoming the deleterious effects of crime and other social inequity. There is increasing evidence to suggest that victim-offender reconciliation programs may have the potential for far broader applications than was previously thought possible or desirable (Gehm, 1992, p. 547)."

I have now seen on video, as a board member of the program in British Columbia operating a mediation project in serious and violent crime,² numerous victims attest to the overwhelming release forgiveness has brought them in response to serious and violent crime. An evaluation of the program likewise attests to this (Roberts, 1992).

2. Most restorative justice programs are plagued by at least a few of the following shortcomings:
 - a. Mediation is applied unsystematically to cases.
 - b. First-time property offenders have tended to be the main targets of mediation programs.
 - c. Disproportionately small numbers of minorities and high numbers of juveniles are mediation clients.

2. Any video material from this program is strictly confidential, and may only be viewed with the explicit permission of the victims and offenders concerned.

- d. Recidivism rates may not necessarily be lower and in one study were higher than a control group of prisoners though, on balance, there is less recidivism after mediation and not more than that in traditional criminal justice.
- e. Poor planning, unsystematic implementation, shortsighted evaluation of programs is rampant.
- f. Only a small percentage of those coming to mediation would have been incarcerated. Mediation does not seem widely to be an alternative to prison punishment.
- g. Violent offenders are seldom included in mediation programs, though there has been very positive experience in programs where this is used, including Genesee Justice in Batavia New York, and the Victim Offender Mediation Program in Langley, British Columbia.³
- h. Many methodological problems abound in mediation programs.
- i. Mediation programs sometimes buttress the idea that the majority of offenders must be dealt with punitively, while only a minority of offenders may be dealt with through restorative justice.
- j. Sometimes the offender was encouraged to posture in order to win the victim's and justice system professionals' favour.
- k. Mediation is designed as an offender support such that victims are served only as a by-product of an offender-centred initiative.

3. See Appendix B.

Conclusion

"A system based on restorative justice would be similar to the present one, with one change in procedure, one significant addition, and one major change. Precedents for all these are already in existence.

"The change in procedure... is... prosecution would proceed only when adequate reparation was not forthcoming from the offender.

"The addition would be local mediation services...

"The major change would be that the primary purpose of the courts would be restoration of the community and the individual victim, where there is one, rather than punishment of the offender (Wright, 1991, p. 117)."

Howard Zehr repeatedly underscores in *Changing Lenses* that restorative justice is not yet the "new paradigm" in Western criminal law. There is still a long way to go.

Kai Bussmann suggests that the symbolic function of Western criminal law must be maintained. This is similar to the idea of Mosaic Law: that an ideal was held out for, to which the unwritten code of love, as Jesus taught it in the New Testament, was the real fulfillment of the Old Testament Law.

Similarly, Bussmann calls for a "reflexive law" in which law is not used mainly for direct regulation of society, but to provide an abstract guiding system in which restorative justice applications are the norm (1992). This too is a similar notion to the role played by Mosaic Law in the Old Testament, which Jesus could summarize into two basic injunctions: Love God and love your neighbor.

An Old Testament scholar contrasts the "unwritten biblical law" which gives rise to the written code, with the code itself, in that there is often

tension between the two approaches (Patrick, 1985). Jesus' great complaint of how his contemporaries applied the Law was: "But you have neglected the more important matters of the law — justice, mercy and faithfulness (Matthew 23:23.)"

Bussmann suggests that penal sanctions must be performed in only select, but few, cases (1992, pp. 324–325).

The modern state of Japan would fit this idea of reflexive law. It operates a two-track system of justice. The first track involves all who are willing to participate in a process of "confession, repentance, and absolution" (Haley, 1989, pp. 195–211). In practice, since World War II, Japan is the only industrialized nation which has consistently and significantly reduced both its prison population, as well as all indices of crime, including serious and violent crime (Haley, 1989, pp. 195–211; Haley, 1992, pp. 105–130).

In Canada, Quaker activist Ruth Morris has proposed the establishment of *Transformative Justice Courts* which would be always available to all parties to the crime as a first option (1992). Mediation, trauma/grief and community resource specialists would be available to facilitate healing for all parties to the crime. Should there be a breakdown of this process, the traditional retributive process would be the backup. Morris also outlines a 10-step process of healing in response to the trauma of crime.

She proposes that this kind of system could be easily established in every criminal justice jurisdiction in Canada, with resultant immense monetary savings, a greatly increased experience of justice for all parties, a cessation of the immorality of punishment as an end; and a reversal of the failures of the current system.

Restorative justice has not yet "arrived." Few justice jurisdictions in the world have enacted enabling legislation. Japan is one exception. Some

North American jurisdictions have seen this response take root in every form of crime .

My predecessor, Dave Worth, often would say we are in a hundred year gestation process with this vision. Extending the metaphor, the labour at times is difficult, but anticipation of the birth warrants the effort.

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Appendix A*

PARADIGMS OF JUSTICE

Short Form:

Retributive Justice

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

Restorative Justice

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

Long Form:

Retributive Justice

1. Crime violates the state and its laws.
2. Justice focuses on establishing guilt
3. so that doses of pain can be measured out.
4. Justice is sought through a conflict between adversaries
5. in which offender is pitted against state.
6. Rules and intentions outweigh outcomes. One side wins and the other loses.

Restorative Justice

1. Crime violates people and relationships.
2. Justice aims to identify needs and obligations
3. so that things can be made right.
4. Justice encourages dialogue and mutual agreement,
5. gives victims and offenders central roles, and
6. is judged by the extent to which responsibilities are assumed, needs are met, and healing (of individuals and relationships) is encouraged.

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CONCEPTS OF JUSTICE, BIBLICAL AND MODERN

<i>Contemporary Justice</i>	<i>Biblical Justice</i>
1 Justice divided into areas, each with different rules	Justice seen as integrated whole
2 Administration of justice as an inquiry into guilt	Administration of justice as a search for solutions
3 Justice tested by rules, procedures	Justice defined by outcome, substance
4 Focus on infliction of pain	Focus on making right
5 Punishment as an end	Punishment in context of redemption, shalom
6 Rewards based on just deserts, "deserved"	Justice based on need, undeserved
7 Justice opposed to mercy	Justice based on mercy and love
8 Justice neutral, claiming to treat all equally	Justice both fair and partial
9 Justice as maintenance of the status quo	Justice as active, progressive, seeking to transform status quo
10 Focus on guilt and abstract principles	Focus on harm done
11 Wrong as a violation of rules	Wrong as violation of people, relationships, shalom
12 Guilt as unforgivable	Guilt forgivable though an obligation exists
13 Differentiation between "offenders" and others	Recognition that we are offenders
14 Individual solely responsible; social and political contexts unimportant	Individual responsibility, but in holistic context
15 Action as free choice	Action as choice, but with recognition of the power of evil
16 Law as prohibition	Law as "wise indicator," teacher, point for discussion
17 Focus on letter of law	Spirit of law as most important
18 The state as victim	People, shalom, as victim
19 Justice serves to divide	Justice aims at bringing together

CONCEPTS OF JUSTICE, RETRIBUTIVE JUSTICE AND RESTORATIVE JUSTICE

<i>Retributive Lens</i>	<i>Restorative Lens</i>
UNDERSTANDINGS OF CRIME	
1 Crime defined by violation of rules (i.e., broken rules)	Crime defined by harm to people and relationships (i.e., broken relationships)
2 Harms defined abstractly	Harms defined concretely
3 Crime seen as categorically different from other harms and conflicts	Crime recognized as related to other harms and conflicts
4 State as victim	People and relationships as victims
5 State and offender seen as primary parties	Victim and offender seen as primary parties
6 Victims' needs and rights ignored	Victims' needs and rights central
7 Interpersonal dimensions irrelevant	Interpersonal dimensions central
8 Conflictual nature of crime obscured	Conflictual nature of crime recognized
9 Wounds of offender peripheral	Wounds of offender important
10 Offense defined in technical, legal terms	Offense understood in full context: moral, social, economic, political
UNDERSTANDINGS OF ACCOUNTABILITY	
1 Wrongs create guilt	Wrongs create liabilities & obligations
2 Guilt absolute, either/or	Degrees of responsibility
3 Guilt indelible	Guilt removable through repentance and reparation
4 Debt is abstract	Debt is concrete
5 Debt paid by taking punishment	Debt paid by making right
6 Debt owed to society in the abstract	Debt owed to victim first
7 Accountability as taking one's "medicine"	Accountability as taking responsibility
8 Assumes behavior chosen freely	Recognizes difference between potential and actual realization of human freedom
9 Free will or social determinism	Recognizes role of social context as choices without denying personal responsibility

<i>Retributive Lens</i>	<i>Restorative Lens</i>
UNDERSTANDINGS OF JUSTICE	
1 Blame-fixing central	Problem-solving central
2 Focus on past	Focus on future
3 Needs secondary	Needs primary
4 Battle model; adversarial	Dialogue normative
5 Emphasizes differences	Searches for commonalities
6 Imposition of pain considered normative	Restoration and reparation considered normative
7 One social injury added to another	Emphasis on repair of social injuries
8 Harm by offender balanced by harm to offender	Harm by offender balanced by making right
9 Focus on offender; victim ignored	Victims' needs central
10 State and offender are key elements	Victim and offender are key elements
11 Victims lack information	Information provided to victims
12 Restitution rare	Restitution normal
13 Victims' "truth" secondary	Victims given chance to "tell their truth"
14 Victims' suffering ignored	Victims' suffering lamented and acknowledged
15 Action from state to offender; offender passive	Offender given role in solution
16 State monopoly on response to wrongdoing	Victim, offender, and community roles recognized
17 Offender has no responsibility for resolution	Offender has responsibility in resolution
18 Outcomes encourage offender irresponsibility	Responsible behavior encouraged
19 Rituals of personal denunciation and exclusion	Rituals of lament and reordering
20 Offender denounced	Harmful act denounced
21 Offender's ties to community weakened	Offender's integration into community increased
22 Offender seen in fragments, offense being definitional	Offender viewed holistically

<i>Retributive Lens</i>	<i>Restorative Lens</i>
23 Sense of balance through retribution	Sense of balance through restitution
24 Balance righted by lowering offender	Balance righted by raising both victim and offender
25 Justice tested by intent and process	Justice tested by its "fruits"
26 Justice as right rules	Justice as right relationships
27 Victim-offender relationships ignored	Victim-offender relationships central
28 Process alienates	Process aims at reconciliation
29 Response based on offender's past behavior	Response based on consequences of offender's behavior
30 Repentance and forgiveness discouraged	Repentance and forgiveness encouraged
31 Proxy professionals are the key actors	Victim and offender central; professional help available
32 Competitive, individualistic values encouraged	Mutuality and cooperation encouraged
33 Ignores social, economic, and moral context of behavior	Total context relevant
34 Assumes win-lose outcomes	Makes possible win-win outcomes

Appendix B

The Japanese Experience and Some North American "Demonstration Plots"

The cynic in us says: "The theory sounds good. And you have mentioned the expansion of this theory into program development in several industrialized countries around the world. But really, are not all these programs fairly marginal, functioning under state-empowered law enforcement authorities? Are they not dependent therefore upon a model fundamentally at odds with its own motivating principles? Are they not all merely somewhat unusual adjuncts to the 'usual' way of doing justice, which Western culture has practised for a millennium? Are they really alternatives?"

These are valid questions. Since World War II, one industrialized country outside the Western legal orbit has significantly moved away from a retributive model towards a restorative paradigm: Japan. Two North American locations have significantly implemented restorative justice principles while working within the current criminal justice system: Genesee County, New York and Langley, British Columbia.

Concerning Japan, I am drawing on research done by Prof. John O. Haley, primarily in a paper entitled *Victim Offender Mediation: Lessons from Japanese Experience*.¹

1. This was given to me by the author prior to publication, and was to have appeared in *Mediation Quarterly* in 1993. A bibliography of his other writings on this theme may be found in Haley, 1992, p. 129.

Please note that all page numbers (in brackets) in this section are from my copy of the paper.

1. The Japanese Experience

Japan is the most successful industrial democracy in crime reduction. Not only does it have the lowest crime rates of any such country, but it has significantly falling crime rates. Since World War II, the number of non-traffic Penal Code offenses per 100,000 fell by 30%. During the same period, the number of non-traffic Penal Code offenders decreased by 27%. Since 1963, homicide rates reduced by 40%, robbery by 60%, and rape by nearly 80%.

Various theories have been advanced about why there has been this "spiral of success" in dealing with crime. There are some unique cultural variables that have strongly influenced this success level. But it is important to note that this accomplishment has not been static, rather dynamic, with dramatic decreases occurring in all levels of criminal activity since World War II.

Haley draws approvingly upon the analysis of another criminologist, John Braithwaite (1989, p. 61ff), to argue that the most important factor in crime reduction in Japan has been the official system's policy of incorporating voluntary community associations into its operations in order to humanize the entire process. "Police, prosecutors, and judges share an overriding mission to correct rather than to punish, to incapacitate, or to rehabilitate. Consequently, they exercise their separate, formal functions of apprehending, prosecuting, and assuring fair adjudication of guilt within the shadow of a prevailing common objective to reform the offender and restore him or her to the community (p. 8)."

Essential to this communitarian and restorative approach is the formal discretionary authority of the police, prosecutors, and judges. This has been institutionalized in three key ways:

1. The police have discretion not to report minor offences, when deemed appropriate.
2. Prosecutors may suspend prosecution when warranted.

3. Judges may suspend the execution of sentences.

Since World War II, the state has sanctioned a two-track response to crime. The primary and initial response after arrest is informal, the secondary and back-up response is formal. As a result, "A pattern of confession, repentance, and absolution dominates each stage of law enforcement in Japan. The players in the process include not only the authorities in new roles but also the offender and the victim. From the initial police interrogation to the final judicial hearing for sentencing, the vast majority of those accused of criminal offenses confess, display repentance, negotiate for their victims' pardon and submit to the mercy of the authorities. In return they are treated with extraordinary leniency; they gain at least the prospect of absolution by being dropped from the formal process altogether (Haley, 1989, p. 195)."

Here are the statistics:

1. The police do not report up to 40% of all apprehended offenders.
2. Prosecutors suspend prosecution of convictable suspects in nearly a third of reported cases.
3. Judges consistently suspend sentences in nearly 60% of adjudicated cases, and only a small fraction of all offenders ever see the inside of a jail or prison. Also, length of prison sentences for all crimes is significantly less than in Canada.

"To justify such leniency, Japanese law enforcement officials must be satisfied that the process of self-correction and community control has begun. The offender's acknowledgement of guilt, expression of remorse, and willingness to compensate any victim[s] are not sufficient. The family and the community must also come forward and accept responsibility to ensure that steps will be taken to prevent future misconduct and to provide some means of control. Even this is not as determinative,

however, as the victim's response. The victim must express forgiveness (p. 9)."

The Japanese system works. There is a general spiral of success in countering crime. Recidivism rates also are steadily decreasing in Japan as a direct outcome of the state's first track response of confession, repentance, and absolution.

Recalcitrant offenders, however, do not receive lenient treatment. Incarceration and capital punishment are still official state sanctions. But lengths of incarceration are dramatically less for most crimes than in North America. And capital punishment is rarely used.

Can this model be transferred to Canada and other Western countries? Yes, argues Haley.

Two objections however to using Japan as a model arise. First, there is the contention that Japanese society is overwhelmingly homogeneous in comparison to North American society. While this is true ethnically, it is not the case culturally. The political, social and religious diversity in Japan is as great as that in North America and Europe.

Second, it is argued that Japan is far more communitarian than the individualistic societies of North America. However, within North American society there is a rich diversity of "mini-communities." In Japan, similar communities are found throughout the urban setting: the school, the bank, the union, the trade association, etc. What is distinctive about the Japanese experience is the explicit incorporation of these communities into the formal justice process. In our Canadian experience on the contrary, the bias of the system has been to exclude the wider community, to keep criminal justice the unique prerogative of the trained professionals.

According to Haley, the main barriers to acceptance of this paradigm in North American society "... are cultural.... [P]ublic demands for punishment substantially hinder any attempt to establish a restorative

approach. Closely related is the hostility of many law enforcement officials toward such efforts, motivated, I believe, by doubts as to their effectiveness, acceptance of the 'justice' of legally prescribed penalties, and reaction to any threat to their exclusive control over the criminal justice process (p. 14)."

If these barriers are overcome, a Japanese style of justice may provide a significant contribution to a more peaceful North America.

2. North American "Demonstration Plots"

A farmer who wishes to convince others to try a new seed, or a new technique, may choose to grow a "demonstration plot" to convince fellow farmers that the new way is better. The following programs are potent in this regard.

Genesee Justice: Batavia, New York

For the past dozen years, Genesee County in New York has enlisted the support of more than 120 community agencies to provide extensive community service alternatives to incarceration, intensive assistance to victims, and community-based programs for the reintegration of offenders into the community.

As a result, the Genesee county jail operates at 80% capacity. And half of these prisoners are not from the local communities.

Its Mission Statement, entitled "Peacework... our Mission," states: "Peacework is never easy. It requires commitment and caring. It brings together peace and justice. It attempts to conciliate rather than condemn. It requires more than words to make peacework. It affirms hope to the hopeless and healing to those hurting. It requires every ounce of energy... every ounce of sensitivity. It advocates for a reconciling rather than an adversary justice philosophy. It attends equally to those broken and bruised victims and offenders of our communities. It

brings together, spiritually and physically, victims, offenders and community wherever possible. Genesee Justice — Peace at work... Peace until we meet again."²

Although its success story has been told hundreds of times throughout North America, it has not been replicated in any other North American jurisdiction. The unique combination of community and professional justice workers is very difficult to bring and hold together for this kind of justice approach to work.

An information packet entitled *Genesee Justice: Instruments of Law, Order, and Peace*, may be ordered from: Community Service/Victim Assistance Program, Genesee County Sheriff's Dept., County Building No. 1, Batavia, New York, 14020-3199; Phone: (716)344-2550, Ext. 226.

Victim Offender Mediation Program: Langley, British Columbia

The Victim Offender Mediation Program (V.O.M.P.) began as a pilot project in 1991. After one year of operation, it was evaluated by Focus Consultants under contract to the Canadian Ministry of the Solicitor General.

The program was designed to "meet the need for healing and closure for victims and offenders in the most serious crimes in the Canadian Criminal Code. The program allows for the opening of safe channels of communication between participants which take into account the individual needs, concerns and safety of the people involved."³

By May, 1993, over fifty cases had been received.

2. From the information packet.

3. From the program's brochure.

Some highlights of the evaluation are:

1. There is a feeling that somebody cares, that VOMP was a unique opportunity. "For many victims, especially those that [sic] did not go to a face-to-face meeting, one of the strongest impacts at the outset was that somebody not only was willing to listen to them (for the first time in 17 years in one case), but cared about what they had to say and understood their position...."

"Three offenders spoke movingly of the opportunity to communicate with their victim(s) as a gift (in two cases it was expressed almost like a 'miracle'), an opportunity that they had considered (in one case for over 15 years), but had never dreamed could be positive (Roberts, p. 25)."

2. Communication was experienced as powerful, difficult, frightening, devastating, exhilarating, euphoric. "The strength of these feelings has an upside and a downside. The upside is the obvious feeling of well-being after the event, especially where it has been, as was the case in these instances, well handled. The downside is the possibility of letdown at a point 3 or 4 days later.... For the offender, this is the point at which he re-assimilated the pain and destruction he had caused the victim, and seriously questioned his validity as a human being. For the victims, this seemed to be the point at which they re-entered the everyday world, and began to worry about their capacity to make adjustments to their new (although emotionally improved) life (Roberts, pp. 25 & 26)."
3. The process enabled each party to see the other as a human being. "One of the key impacts for both parties is to experience the other person as a human being (Roberts, p. 26)."
4. There was a new ability to give and receive a gift. "It was critical for the offenders we interviewed to 'hear' and acknowledge their victim. It was a 'gift' both in terms of an opportunity they had for their own

development and well-being, and in terms of knowing the enormous relief it could bring the victim (Roberts, p. 26)."

5. There was peace and an end of the terror, shame and guilt.

"A counterpart to the euphoria described above was a feeling of peace, especially for victims, and an end to their sense of terror about the offender, and their own shame and/or contradictory guilt feelings about the offence (Roberts, p. 26)."

There was an ability to get on with one's own life, and bring closure to the event. "For both offenders and victims that communicated directly, the meeting or letter exchange had provided a significant closure to the offence. In several cases, the communication triggered an awareness of the importance of dealing with prior victimization (e.g., abuse within their own family), and the individuals wanted to get on with that process (Roberts, p. 27)."

6. There was an improvement in family relations. "Several victims, those who communicated with the offenders and those who didn't, spoke in terms of improvements in their relations with spouses, children, friends and/or employers (Roberts, p. 27)."

One Case Management Officer testifies movingly: "I've been in the system for nearly 40 years; I've seen a lot and yet you've brought a whole new dimension to my work out here. The bus used to unload at the gate, like the raft at the River Styx, on the shore of a hopeless abyss.... You're providing hope for the future. I've seen the outcomes for both the victims and the inmates, again and again. I see them when they come in, and I see their demeanour when they leave again after one of the meetings you conduct. The difference is dramatic. And I see the effect on the inmates — how their attitude and behaviour change. You can't see these things month after month and not become a believer."

You may write for further information to: F.R.C.J.I.A., #101 – 20678 Eastleigh Cres., Langley BC, Canada, V3A 4C4.

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