

Repairing the Harm: Victims and Restorative Justice

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I. INTRODUCTION

One of the leading arguments for restorative justice is the abandonment of victims' interests by the jurisprudence of retribution. That jurisprudence is arguably based on false assumptions about facts and limited imagination about possibilities. The past decade of research and development work on restorative justice in the common law jurisprudence of Australia and England provides better evidence and broader imagination for a new jurisprudence. Such a jurisprudence would include victims in ways that victims and the general public actually prefer—and not in ways that law professors fear. Most of all, it would focus the law on repairing and preventing the harm of crime, rather than on exacting a just measure of pain from offenders. Whether it can succeed in preventing crime will take many years to learn. But evidence for the success of restorative justice in repairing the harm of crime is rapidly accumulating.

This Article examines key claims about what victims want, and what the public thinks they should have, in relation to the disposition of apprehended offenders. It then shows evidence from randomized field tests comparing restorative justice to conventional justice. This evidence shows that victims say they get far more “justice,” in their own terms, from restorative alternatives to court processes than they do from a court. This evidence raises critical issues about the relationship between victim interests, offender interests, and community interests in public safety. The possibility that serving victim interests could harm public safety is one that requires careful empirical examination as restorative justice develops. But so far it is a possibility that has not been demonstrated to occur in any field test. Thus, the central question remains whether a new jurisprudence should be developed around a model of justice that gives more procedural and distributive fairness to victims without harming offender rights or public safety.

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II. THE ABANDONED VICTIM

A. *The Theft of Crime From Victims*

Victims are widely recognized to be the neglected party in the criminal justice process.¹ Neither their needs nor their preferences are usually taken into account in the prosecution and sentencing of offenders.

It was not always so. Restorative justice was once the predominant response to crime in most societies.² Its focus was on limiting future harm from retaliation and blood feuds. Its method was to repair the past harm done, rather than to inflict an equal and just measure of pain. Restorative justice disappeared in the North Atlantic world when kings found it profitable to establish a “king’s peace,” paid for by the compensation that formerly went to victims. As Nils Christie has suggested, kings “stole” crimes from victims long before kings could offer much protection in return.³ Restorative justice was the predominant form of English justice, for example, until shortly after the Norman Conquest, when King Henry II (Thomas Becket’s nemesis) made the crown the victim of all felonies around 1180.⁴ Restorative justice disappeared elsewhere in Western Europe at about the same time,⁵ eventually to be followed by a terrible rise in the cruelty of kings’ punishments.⁶ The logic of justice was converted from reconciliation to repression, with fear the primary emotion to be engendered and outrage the main emotion to be expressed. The decisions to effect these changes were never democratic, but the retributive legacy of tyrannical monarchs has long been accepted as more “natural” than the indigenous justice it replaced. This supposedly natural justice abandons victims to fend for themselves, rather than embracing them as the central focus of harm to be repaired. As Doreen McBarnett observed about the contemporary legacy of this monarchical expropriation: “The state is not just the arbiter in a trial between victims and offenders; *the state is the*

¹E.g., LESLIE SEBBA, THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM 1–4 (1996); Joanna Shapland, *Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies*, in INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE 147, 147–49 (Adam Crawford & Jo Goodey eds., 2000) [hereinafter INTEGRATING A VICTIM PERSPECTIVE].

²John Braithwaite, *Restorative Justice*, in THE HANDBOOK OF CRIME AND PUNISHMENT 323, 323 (Michael Tonry ed., 1998).

³See Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 7–8 (1977).

⁴STEPHEN SCHAFER, THE VICTIM AND HIS CRIMINAL: A STUDY IN FUNCTIONAL RESPONSIBILITY (1968).

⁵See Elmar G.M. Weitekamp, *The History of Restorative Justice*, in RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 75, 87–88 (Gordon Bazemore & Lode Walgrave eds., 1999).

⁶WILL & ARIEL DURANT, THE STORY OF CIVILIZATION, PART IX: THE AGE OF VOLTAIRE 69–74 (1965).

victim If victims feel that nobody cares about their suffering, it is in part because *institutionally* nobody does.”⁷

This much most people agree upon. There is far less consensus on what to do about it. The growing strength of the victim movement over the past two decades has led to increasing demands for recognition of the legitimacy of the victim’s role in criminal justice processing.⁸ In response, over the past two decades our adversarial justice system has struggled to find ways to be more accommodating to victims. These attempts include:

- better facilities for victims in the courts
- improved access to counseling
- modest compensation for some crimes
- minor innovations in court procedures affording greater, but still indirect and largely symbolic, victim involvement in the criminal justice system

The evidence suggests these concessions may not be the changes that victims themselves say are the most important to them; indeed, little attention has been paid to the accumulated knowledge about what victims really want.⁹

B. Are Victims As Retributive As Claimed?

Claims are frequently made about victims’ views of the criminal justice system by the media, elected officials, lobbyists, and civil libertarians. Victims’ views are usually assumed to be more punitive than those of the general public. Such claims have been used to support more retributive criminal justice policies.¹⁰ The same claims have also been used to exclude victims from criminal justice processes, on the grounds that victims will distort the efforts of courts to maintain consistent procedures and principles of sentencing. In a jurisprudence devoted to fairness for inflicting great pains on offenders, both the left and the right have justified the exclusion of victims as an obstacle to justice for offenders.

⁷Doreen McBarnett, *Victim in the Witness Box—Confronting Victimology’s Stereotype*, 7 CONTEMP. CRISES 279, 293 (1983).

⁸See MIKE MAGUIRE & CLAIRE CORBETT, THE EFFECTS OF CRIME AND THE WORK OF VICTIMS SUPPORT SCHEMES 224–25 (1987); Jan van Dijk, *Ideological Trends Within the Victims Movement: An International Perspective*, in VICTIMS OF CRIME: A NEW DEAL? 115, 122–26 (Mike Maguire & John Pointing eds., 1988).

⁹See generally HEATHER STRANG, REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE 1–42 (2002) (discussing various studies).

¹⁰Helen Reeves and Kate Mulley, both activists in the British victim movement, describe how “[c]ampaigners for tougher sentences have used statements made by individual victims of crime as if they represent the views of ‘all’ crime victims. In fact, victims’ views on sentencing seem to be as varied as that of any other cross-section of the general public.” Helen Reeves & Kate Mulley, *The New Status of Victims in the UK: Opportunities and Threats*, in INTEGRATING A VICTIM PERSPECTIVE, *supra* note 1, at 125, 142.

While individual victims may be angry and initially seek vengeance, surveys have repeatedly found that most victims do not have these feelings.¹¹ Two decades of research reveal a rather different agenda held by victims themselves compared with those who speak for them. The latter are right that victims are unhappy with criminal justice. They are wrong in claiming that the unhappiness is focused on leniency of punishment.

Instead of centering their criticisms on leniency in sentencing decisions, victims' dissatisfaction with the way they are treated tends to hinge on more personal concerns. They say they are unhappy about their lack of a legitimate role in the processing of their cases beyond that of witness for the prosecution,¹² the lack of opportunity to be consulted about the progress of their cases,¹³ the lack of recognition of the emotional, as well as material, harm they have experienced,¹⁴ and the lack of fairness and respect they receive at the hands of the justice system as a whole.¹⁵

Many victims are, in fact, quite "lenient" in their own views about sentencing. Large proportions of crime victims surveyed are willing to consider alternatives to imprisonment for their offenders if they can play a part in the way their case is handled. Victims' views on this subject in Britain, for example, have been very clear on this point and have remained remarkably stable over time. In victim surveys in both 1984 and 1998, about two-thirds were willing to countenance some sort of restorative or reparative response.¹⁶ In 1998, over 40% of British crime victims surveyed said they would have accepted the opportunity to meet their offender, and almost 60% of victims said they would have been willing to accept a reparative activity from their offender.¹⁷ A relatively influential factor in victim attitudes about meeting offenders was the extent to which the victim felt emotionally upset by the offence: those most affected in this way were the ones most likely to want to meet their offenders and were also the ones most open to reparation.¹⁸

¹¹See Lucia Zedner, *Victims*, in THE OXFORD HANDBOOK OF CRIMINOLOGY 419, 443–44 (Mike Maguire et al. eds., 2002).

¹²See JOANNA SHAPLAND ET AL., VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 176–78 (1985).

¹³See MIKE MAGUIRE, BURGLARY IN A DWELLING: THE OFFENCE, THE OFFENDER AND THE VICTIM 134–38 (1982); SHAPLAND ET AL., *supra* note 12, at 47–50; IRVIN WALLER & NORMAN OKIHIRO, BURGLARY: THE VICTIM AND THE PUBLIC 45–46 (1978).

¹⁴STRANG, *supra* note 9, at 2–3.

¹⁵See SEBBA, *supra* note 1, at 104–06; Joanna Shapland, *Victims and the Criminal Justice System*, in FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM 210, 214–16 (Ezzat A. Fattah ed., 1986).

¹⁶JOANNA MATTINSON & CATRIONA MIRRLEES-BLACK, LONDON HOME OFFICE, ATTITUDES TO CRIME AND CRIMINAL JUSTICE: FINDINGS FROM THE 1998 BRITISH CRIME SURVEY 41 & tbl.6.2 (Home Office Research Study 200, 2000), available at <http://www.homeoffice.gov.uk/rds/pdfs/hors200.pdf>.

¹⁷*Id.* at 41 & 42 tbl.6.3.

¹⁸*Id.* at 43.

C. Does the Public Want More Retribution For Victims?

Even if victims are not as retributive as many claim, the general public is thought to be overwhelmingly in favor of more retribution on victims' behalf. The basis for this conclusion is not altogether specious. Polls of public attitudes towards criminal justice tend to reveal widespread dissatisfaction with the current system. Annual surveys of satisfaction with criminal justice and local courts suggest high levels of dissatisfaction, which many interpret to be a result of "soft on crime" sentencing practices. But the causes of this dissatisfaction have not been clearly linked to leniency. Rather, dissatisfaction may be just as likely to result from a lack of effective options for preventing repeat offending.

One 1998 survey of the public in nine states in the northeastern United States indicated that 75% of over 4000 respondents liked "the idea of totally revamping the way the criminal justice system works," even without assuming anything about what the alternatives would be.¹⁹ What may appear as "tough" public attitudes may spring, rather, from a lack of information about viable alternatives. In one of the few public opinion polls to canvass such alternatives, 82% of respondents said they thought "[r]equiring probationers to work to repay victims" would be very or somewhat effective in protecting citizens from crime, and 75% had the same view about "[r]equiring probationers to perform community services."²⁰

In an extensive review of public opinion about punishment and corrections, Francis Cullen et al. concluded that the basis for arguing that the public is unrelentingly punitive lies in national polls that usually ask only a small number of questions about crime policy, focusing on issues such as capital punishment or three-strikes legislation.²¹ The fact that public views are actually more complex emerges in the rare surveys in which respondents are given the opportunity to express opinions in more nuanced ways. Numerous studies demonstrate that when the public is presented with options other than strict "prison/no prison" alternatives, such as drug treatment programs and meaningful intermediate penalties, it favors these intermediate options.²² Respondents often favor intermediate sanctions instead of, as well as in addition to, custodial sentences.²³ For example, the study of attitudes in the northeast United States found that when

¹⁹JOHN M. BOYLE, CRIME ISSUES IN THE NORTHEAST 1 (1999).

²⁰BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 137 tbl.2.54 (1997).

²¹Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 5–10 (2000).

²²*Id.* at 40–47 (citing variety of studies).

²³Surprisingly similar findings emerged from the recent British qualitative study by Martine Stead et al., *What Do the Public Really Feel About Non-custodial Penalties?*, RETHINKING CRIME & PUNISHMENT, Nov. 2002, at 1, 2, 5, available at <http://www.rethinking.org.uk/latest/pdf/briefing3.pdf>.

respondents are asked what they would want to happen to a young drug addict who robbed them at gunpoint, 72% said they would want him to go to jail.²⁴ But when presented with options such as drug treatment, restitution, and strict supervised probation, only 49% said that going to jail was the most important sentence outcome.²⁵ For a nonviolent home burglary committed by a drug addict, the response was even less punitive. While 61% favored jail if the choice was prison/no prison, when presented with other options only 38% said that jail was the most important outcome.²⁶ This survey supports Cullen et al.'s conclusions that complex questions are needed to measure complex opinions and that nonpunitive responses cannot be discerned if the public are not asked questions that are capable of revealing nonpunitive opinions.

D. What Do Victims Really Want From Criminal Justice?

The last two decades have seen substantial research on the precise criticism victims have of criminal justice. This research has also revealed what crime victims would prefer to have the system do for them.

1. Information

Victims repeatedly say that one of the greatest sources of frustration to them is the difficulty in finding out from criminal justice authorities about developments in their cases.²⁷ Indeed, some victims have said that is all they want from the justice system and would be satisfied simply to achieve that goal.²⁸ But it appears that the amount of information victims are likely to be given about their case depends on their value to the prosecution-defense adversaries at each stage of the justice process. A study of over two hundred victims of violent crime in two English cities found that victims initially expressed high levels of satisfaction about their treatment by police—at the point of processing where victims are of highest value as a source of information for the prosecution.²⁹ By the middle of the investigation, victims' satisfaction started to decline and continued to do so, due largely to lack of information about progress with their case. The same pattern

²⁴BOYLE, *supra* note 19, at fig.79.

²⁵*Id.* at fig.80.

²⁶*Id.* at figs.79 & 80.

²⁷For example, Boyle found that while 83% of people surveyed said that it was very important for victims to be informed, only a very small number of victims who reported a crime ever found out whether or not anyone had been arrested, and some of these learned from unofficial sources. *Id.* at 3. Even when victims were informed of an arrest, only 42% felt they were kept informed of developments in the police investigation. *Id.*

²⁸See Mark S. Umbreit, *Crime Victims Seeking Fairness, Not Revenge: Toward Restorative Justice*, FED. PROBATION, Sept. 1989, at 52, 55.

²⁹SHAPLAND ET AL., *supra* note 12, at 27–31.

was detected in a study of English burglary victims, which found that a police response displaying an appropriate level of engagement with the victim's situation was more important to the victim than was solving the crime.³⁰

In a review of several studies of victim attitudes in the United States and Britain, Joanna Shapland concluded that "the rule was: the more the contact [with criminal justice authorities], the greater the satisfaction."³¹ Additionally, Shapland et al. further observed that the victim was regarded as "supernumerary" when the offender pleaded guilty, and there was no requirement for officialdom to preserve a good relationship with someone who was not even required as a prosecution witness.³² Victims still very much wanted to know the outcome of their court case, but there was no procedure for letting them know even that the case had been heard.

Similar views are held by American victims, despite a concerted effort in the United States over the past twenty years to enshrine victims' rights in legislation. Whereas 83% of respondents in John Boyle's study said that it was "very important" that victims be informed about the progress of their cases, only a very small minority of those who had reported a crime ever heard whether anyone had been arrested.³³ Even for those victims who were told about an arrest, less than half felt they were kept informed of the progress of their cases.³⁴

2. Participation

A major complaint of victims is that they are not encouraged to feel part of justice proceedings in their case.³⁵ It appears that participation in the processing of their cases assists victims both in their emotional recovery and in reducing the sense of alienation that results from believing they have no control and no status.³⁶ One of the strategies developed for the purpose of increasing victim participation has been victim impact statements (VIS) that provide a sentencing judge with the victim's view on the nature of the harm—physical, financial, psychological, and social—they have experienced. By 1988, legislation providing

³⁰MAGUIRE, *supra* note 13, at 134–38.

³¹Shapland, *supra* note 15, at 214.

³²SHAPLAND ET AL., *supra* note 12, at 74–75, 77–78.

³³BOYLE, *supra* note 19, at 3.

³⁴*Id.*

³⁵See SEBBA, *supra* note 1, at 192–93; BARBARA E. SMITH, U.S. DEP'T OF JUSTICE, NON-STRANGER VIOLENCE: THE CRIMINAL COURT'S RESPONSE 29–30, 33, 35, 37 (1983); Shapland, *supra* note 1, at 152–53. A large German survey likewise found that most victims (and nonvictims) believed that the role of the victim should go beyond that of simple witness both at the investigation and disposition stages of their case. Michael Kilchling, *Interests of the Victim and the Public Prosecution—First Results of a National Survey*, in VICTIMS AND CRIMINAL JUSTICE 29, 53–55 (G. Kaiser et al. eds., 1991).

³⁶Edna Erez & Pamela Tontodonato, *The Effect of Victim Participation in Sentencing on Sentencing Outcome*, 28 CRIMINOLOGY 451, 467–70 (1990).

for VIS had been enacted in almost all American states,³⁷ Canada, and Australia.³⁸ However, there is now widespread doubt about their effectiveness in giving victims a greater sense of involvement with the justice process or greater satisfaction with outcomes.³⁹ It appears that other means must be found if victims are to feel truly engaged with the justice system.

3. *Emotional Restoration and Apology*

Beyond the calculable material harm victims of crime may experience, there are emotional and psychological dimensions to the loss that have routinely been ignored by the justice system and that need redressing if the experience of victimization is ever to be satisfactorily resolved. While courts and lawyers make reference to pain and suffering experienced by victims, and in some cases financial settlements are arrived at in civil or criminal courts to compensate for this, victims themselves say that emotional harm is healed, as opposed to compensated for, only by an act of emotional repair. The evidence suggests that victims see emotional reconciliation to be far more important than material or financial reparation.⁴⁰

Crimes differ in the extent to which they are stressful. The most intrusive crimes are usually the most stressful.⁴¹ Victims of unanticipated incidents in familiar or benign settings may have to reinterpret the safety of these environments. This results in an increased sense of vulnerability and mistrust, anger, shame, or self-blame. From the victim's perspective, traditional criminal justice fails precisely because it must treat all similar offences in similar ways, regardless of the differential impact of the offence on different victims. Attempts to create consistency for offenders may produce gross inconsistencies for victims, with costs of crime distributed unequally in ways that are far more emotional and powerful than is generally assumed.

In general, victimology literature makes little mention of victims' desire for apologies from their offenders. This is surprising for anyone who has observed the interactions between victims and their offenders when they are unmediated by

³⁷Robert C. Davis & Barbara E. Smith, *Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?*, 22 J. CRIM. JUST. 1, 2–3 (1994).

³⁸See SEBBA, *supra* note 1, at 194–204.

³⁹Davis & Smith, *supra* note 37, at 10–12.

⁴⁰See STRANG, *supra* note 9, at 88–118; see also MARK S. UMBREIT ET AL., VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 95–96 (1994) (finding that 25% of victims in study spontaneously mentioned importance of restorative justice process for resolving their feelings of distress resulting from crime—higher proportion than mentioned material restitution as primary benefit).

⁴¹See STRANG, *supra* note 9, at 95–96 & tbls.5.6 & 5.7 (finding that whereas around 10% of property crime victims reported such physical symptoms of stress as fear of being alone, sleep problems, and headaches, this proportion rose to one-third for victims of violence; around two-thirds of both groups reported general increase in suspicion or distrust after crime).

formal criminal justice processing. In this context, the offer and acceptance of a sincere apology seems the most natural thing imaginable and almost always vital to the successful resolution of the offence and the restoration of the participants. But discussion of apology is redundant if victims' welfare is considered only within the dominant adversarial paradigm of the court system. There is little point in asking victims whether they want an apology when no opportunity exists for a direct exchange between them and their offenders. The relative absence of apology in American law, and Western justice systems generally, may be connected to the propensity of the legal system to reduce all harms to a monetary metric, even those where no economic loss is entailed.⁴²

The goal of apology from a transgressor's point of view is the granting of forgiveness by the victim. But forgiveness may only be acceptable when it is consistent with self-respect and respect for others, as well as being consistent with rules of morality.⁴³ This can be the case only when there is a distinction made between the immoral act and the immoral actor, forgiving the one without tacitly approving of the other so that forgiveness can be squared with self-respect. It may be that "an experience of forgiveness" is what assists victims most of all in recovering from their victimization.⁴⁴

4. *Material Reparation*

When victims experience material harm, they usually want material reparation, and, absent any other available remedy, they will often take money for nonmaterial harm as well. Whether that reparation should come from the state or from the person who caused the harm is an interesting question. When victims are asked, they indicate a strong preference for compensation directly by the offender.⁴⁵ The amount of money or its equivalent that victims suggest as appropriate restitution, when they are consulted, is often small for this very reason—to make it feasible for the offender to pay it. One victim expressed this very clearly: "It should be 50 [pounds] from the court or 200 [pounds] from the CICB [Criminal Injuries Compensation Board]."⁴⁶

⁴²Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, 478–81, 483–87 (1986).

⁴³JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 24–25 (1988).

⁴⁴HOWARD ZEHR, RETRIBUTIVE JUSTICE, RESTORATIVE JUSTICE 1 (Mennonite Central Committee Canada Victim Offender Ministries Program and the MCC U.S. Office of Criminal Justice, 1985).

⁴⁵See Joanna Shapland, *Victims, the Criminal Justice System and Compensation*, 24 BRIT. J. CRIMINOLOGY 131, 135, 144 (1984).

⁴⁶SHAPLAND ET AL., *supra* note 12, at 123.

The right to material reparation from the offender existed for millennia as a basic feature of restorative justice,⁴⁷ both as restitution and as a signal way of vindicating the victim.⁴⁸ The state's expropriation of this entitlement converted it to fines without reference to the victim.⁴⁹ Even though victims' preference for restitution from the offender is recognized, criminal courts tend to be reluctant to become involved in making such orders.⁵⁰ This reluctance is due to the practical difficulties of determining what amount is appropriate, who all the victims are, and what any given offender may be capable of paying.⁵¹ Civil action remains available for victims to sue their offenders, but it is rarely used, for it is possible only in the minority of cases where an offender has some assets. The disconnection of financial penalties from restitution remains a likely source of victim discontent.

5. *Fairness and Respect*

Although it is often assumed that victims' sense of satisfaction with the justice system is related only to sentencing *outcome*, the evidence shows that the main factor influencing satisfaction with the sentence is the perception of fairness with the sentencing *process*.⁵² Furthermore, it appears that victims do not usually seek a decisive role in the outcome of their cases. They only wish to be consulted throughout the criminal justice process. Some scholars fear that consultation with victims would lend bias or inequity to decisions as to guilt or sentencing. But victims rarely seek a role in the adjudication of their cases.⁵³ Rather, they seek the chance to present their view on the case to someone, and not necessarily a key decisionmaker. The chance to be heard at all is usually the crucial aspect for victims in achieving a sense of satisfaction with the justice system.⁵⁴

Where victims have been granted the right to present their perspective, whether to the prosecutor or in court, it appears that victims are not nearly as

⁴⁷Marvin E. Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223, 223–27 (1965-66).

⁴⁸Zehr, *supra* note 44, at 8.

⁴⁹Christie, *supra* note 3, at 7.

⁵⁰Peggy M. Tobolowsky, *Restitution in the Federal Criminal Justice System*, 77 JUDICATURE 90, 90–91 (1993).

⁵¹See SEBBA, *supra* note 1, at 16, 106–08.

⁵²Edna Erez et al., *Victim Impact Statements in South Australia*, in INTERNATIONAL VICTIMOLOGY: SELECTED PAPERS FROM THE 8TH INTERNATIONAL SYMPOSIUM 205, 212–13 (Chris Sumner et al. eds., 1996) [hereinafter INTERNATIONAL VICTIMOLOGY], available at <http://www.aic.gov.au/publications/proceedings/27>.

⁵³SHAPLAND ET AL., *supra* note 12, at 178–84; JO-ANNE M. WEMMERS, VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 122–48 (1996).

⁵⁴Tom R. Tyler, *What Is Procedural Justice?: Criteria Used By Citizens To Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 125–27 (1988).

punitive, retributive, or demanding as criminal defense lawyers had assumed.⁵⁵ This may be connected to victims in court learning much more than they otherwise might about their offender and the circumstances of the crime. The more people know about the circumstances and complexity of an offender's life, the less punitive they tend to be.⁵⁶

III. DOES RESTORATIVE JUSTICE DO MORE FOR VICTIMS?

It seems unlikely that the needs and preferences of victims will be well met by piecemeal reforms. It seems more likely that a new paradigm of justice is required to transform the values and jurisprudence of criminal justice to include victims as stakeholders equal to offenders and the community. While many new paradigms for bringing more justice to victims are possible, one has received more attention from theorists and researchers than any other. That paradigm is restorative justice. Whether restorative justice can ultimately help victims without harming offenders or the community remains to be seen. But it is becoming clear that restorative justice does indeed help most victims.

Increasing empirical evidence shows substantial benefits of restorative justice, with benefits outweighing the harms. The evidence now covers three continents over two decades. Many of the findings summarized below emerge from a major research study, known as the Reintegrative Shaming Experiments (RISE), conducted in Canberra, Australia over the five-year period 1995 to 2000.⁵⁷ In these experiments, offenders who admitted responsibility for one of two categories of crime—personal property crime committed by juvenile offenders, and middle-range violent crime committed by offenders aged up to twenty-nine years—were randomly assigned either to go to court or to be diverted to a restorative justice conference. A conference entailed a meeting convened by a trained facilitator between offenders and their family and friends acting as supporters, together with the victims and their supporters. At the conference, participants discussed what had happened when the offence occurred, who the offence had affected and in what ways, and what could be done to repair the harm caused. In the course of the conference, often a highly emotional encounter, victims explained directly to their offenders the full consequences of the offence. Offenders had the opportunity to take responsibility for their actions and understand the consequences in ways not available in a courtroom. The

⁵⁵Jan J.M. van Dijk, *Crime and Victim Surveys*, in INTERNATIONAL VICTIMOLOGY, *supra* note 52, at 121, 121–22, 130.

⁵⁶See Anthony N. Doob & Julian V. Roberts, *Social Psychology, Social Attitudes, and Attitudes Towards Sentencing*, 16 CAN. J. BEHAV. SCI. 269, 273–75 (1984).

⁵⁷See STRANG, *supra* note 9, at 59–210 (discussing experiences of victims in RISE).

conference ended with an outcome agreement designed to repair the harm caused by the offence.⁵⁸

The evaluation of RISE experiments included observations of the conferences and court proceedings, interviews with victims after their cases were disposed, and review of official data. The evaluation provides evidence of the benefits (and harms) that victims derived from restorative versus conventional justice. The following summary focuses on the general victim demands about justice as reviewed in the preceding section.

A. Information

The way in which restorative justice interventions are structured provides much greater opportunity for victims to know about the progress of their cases than is available when cases are processed through the courts. Moreover, consultation with victims is essential to restorative justice processes. Instead of the justice system informing victims retrospectively on the state of play, as happens with court-processed cases, restorative justice intrinsically requires victims to know what is happening. Of course, there is no guarantee that this will always happen,⁵⁹ but the consequences of failure for restorative justice are far more serious than they are for court-based justice.

In RISE, all victims were asked whether they had been informed “in good time” about when their cases were to be dealt with, whether by court or by conference (Figure 1). In cases dealt with in court, the answer to this question revealed whether victims had been informed at all. Australian (Canberra) legislation specified victims’ right to be informed of the progress of police investigations, the laying of charges, and the outcome of criminal proceedings.⁶⁰ In practice, victims were rarely told anything officially about their case when they were not required as witnesses. This lack of communication was the single greatest cause for dissatisfaction for victims whose cases went to court. Most of these court victims complained that they knew nothing of what their offenders were charged with, or what the outcome was from their offenders’ going to court. By contrast, those whose cases were dealt with by a conference had the opportunity to be as closely involved as they wished with the disposition of their

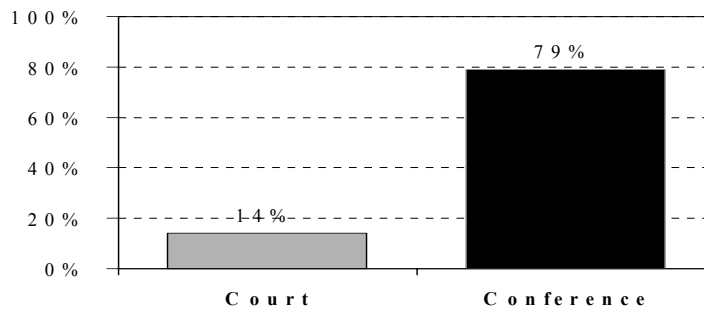
⁵⁸For more information about RISE, see Austl. Inst. of Criminology, *Reintegrative Shaming Experiment (RISE)*, at <http://www.aic.gov.au/rjustice/rise/index.html> (last updated Dec. 10, 2002) (collection of papers and reports on RISE).

⁵⁹See, e.g., Gabrielle M. Maxwell & Allison Morris, *Research on Family Group Conferences with Young Offenders in New Zealand*, in *FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY AND PRACTICE* 88, 90 (Joe Hudson et al. eds., 1996) [hereinafter *FAMILY GROUP CONFERENCES*] (describing shortcomings of restorative justice programs in New Zealand in relation to victim notification).

⁶⁰See Victims of Crime Act 1994, No. 83, § 4 (Austl. Cap. Terr.), available at <http://www.legislation.act.gov.au/a/1994-83>.

cases. The high attendance rate by victims was in large measure due to the attention given to arranging conferences at their convenience and to the amount of time put into explaining their roles and responsibilities to them.

Figure 1: Informed in good time about when the case was to be dealt with—All Victims



$$\chi^2 = 94.356, df = 1, p \leq .000; \text{Cohen's } d = 1.725$$

B. Participation

A restorative justice encounter inevitably entails a high degree of participation by both victims and offenders. Victims emphasize the personal nature of the process and the chance they have to play an active role in the delivery of justice as benefits that they value and that are not available in the court.⁶¹ In restorative justice programs that have failed to give adequate attention to ensuring that victims are able to participate, victims have been as critical of restorative justice as they are about their treatment at the hands of the traditional justice system.⁶²

When RISE victims who went to a conference were asked why they decided to attend, almost two-thirds said that the chance “to have their say” and the opportunity “to express their feelings directly to the offender” were important

⁶¹See PAUL McCOLD & BENJAMIN WACHTEL, U.S. DEP’T OF JUSTICE, RESTORATIVE POLICING EXPERIMENT: THE BETHLEHEM PENNSYLVANIA POLICE FAMILY GROUP CONFERENCING PROJECT 53–55 & 55 exhibit 39 (1998), available at <http://fp.enter.net/restorativepractices/BPD.pdf>; STRANG, *supra* note 9, at 118–30; UMBREIT ET AL., *supra* note 40, at 94.

⁶²See, e.g., GABRIELLE M. MAXWELL & ALLISON MORRIS, FAMILY, VICTIMS AND CULTURE: YOUTH JUSTICE IN NEW ZEALAND 119–22 (1993) (outlining victims’ satisfaction in New Zealand programs); Donald Clairmont, *Alternative Justice Issues for Aboriginal Justice*, 36 J. LEGAL PLURALISM & UNOFFICIAL L. 125, 142–51, 154–55 (1996) (referring to Canadian programs that were criticised for being excessively offender-focused and having low levels of victim attendance).

reasons for attending. Ninety-three percent of them agreed that they had had an opportunity to explain the loss and harm that resulted from the offence, and 88% said they had been able to express their views. All of these indicators show substantial interest in, and achievement of, participation in the justice process.

C. *Emotional Restoration and Apology*

If emotional restoration is what victims value most for their recovery,⁶³ then restorative justice offers ample opportunity for this to occur.

1. *Apologies*

Eighty-six percent of Canberra victims attending restorative justice conferences received apologies from their offenders, in comparison to only 16% of victims whose cases were disposed of in court. The opportunity restorative justice allows to come face-to-face with an offender clearly enhances the likelihood of an apology being offered: indeed, apology is usually seen as central to the process of restoration.⁶⁴ Furthermore, it appears that the expression of remorse and a genuine desire for reconciliation on the part of the offender is a significant predictor of offenders' desistance from future offending.⁶⁵

2. *Forgiveness*

Beyond the need to receive an apology, it may be that for full emotional restoration to occur, victims also need to be able to forgive.⁶⁶ Restorative justice may help them do that. Canberra victims who attended restorative justice conferences later said they forgave their offenders in 39% of the cases. While that is not a majority, it is a far higher percentage than might be expected of "naturally" retributive victims. Forgiveness seems to have the power to release victims from the desire for punishment and revenge.⁶⁷ While it is far from being

⁶³See, e.g., TONY F. MARSHALL & SUSAN MERRY, CRIME AND ACCOUNTABILITY: VICTIM/OFFENDER MEDIATION IN PRACTICE 182–85 (1990); Jim Dignan, *Repairing the Damage: Can Reparation Be Made To Work in the Service of Diversion?*, 32 BRIT. J. CRIMINOLOGY 453, 460 (1992) (arguing that receiving explanation and apology are of far greater value than reparation). Twice as many victims participating in the Australian RISE said they wanted an apology as said they wanted money from their offenders (43% compared with 89%).

⁶⁴See MAXWELL & MORRIS, *supra* note 62, at 117–18; MCCOLD & WACHTEL, *supra* note 61, at 54, 58; STRANG, *supra* note 9, at 113–18; Trish Stewart, *Family Group Conferences with Young Offenders in New Zealand*, in FAMILY GROUP CONFERENCES, *supra* note 59, at 65, 75–81 (describing New Zealand restorative justice programs).

⁶⁵See Maxwell & Morris, *supra* note 59, at 107.

⁶⁶See Zehr, *supra* note 44, at 1.

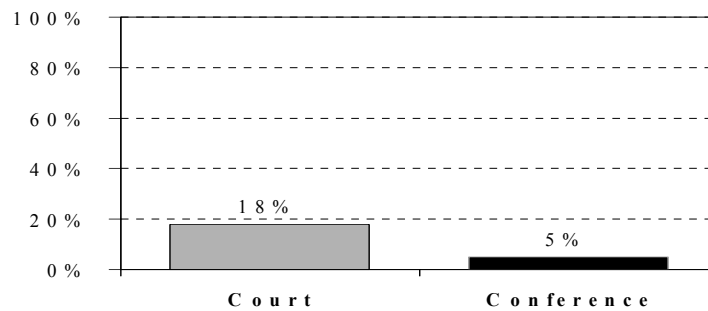
⁶⁷See HANNAH ARENDT, THE HUMAN CONDITION 236–43 (1958); DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 165–67, 258–70 (1999).

an automatic response to apology, in restorative justice or any other setting, it is difficult to feel unless a sincere expression of remorse is expressed—something victims almost never have the chance to hear in the courtroom.⁶⁸

3. Safety and Fear

An important measure of emotional restoration for victims is the regaining of a sense of safety and security and a reduction in fear. When RISE victims were asked whether they expected their offenders to repeat the offence on them, there was a large difference between those who were assigned to attend a conference and those whose cases were dealt with in court (see Figure 2). This was especially apparent for victims of violent crime, where more than five times as many court victims as restorative justice conference victims believed they would be revictimised by their offender.

Figure 2: Anticipate the offender will repeat the offence on me—All Victims

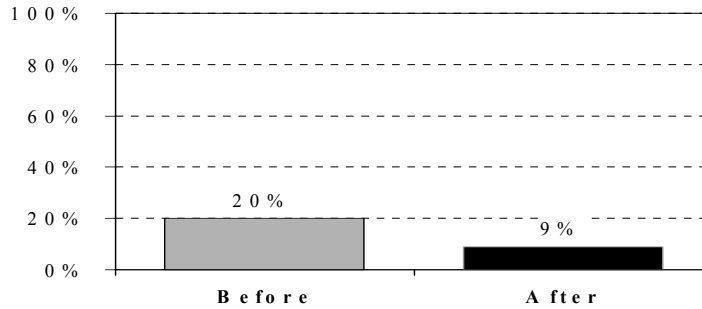


$$\chi^2 = 9.727, df = 1, p \leq .002; \text{Cohen's } d = .777$$

When victims who attended a conference were asked about their fear of the offender before and after the conference, there was a significant reduction in the number of victims who said they felt frightened afterwards (see Figure 3). This was especially evident for the victims of *violent* offences, 38% of whom said they were afraid before the conference, compared with 14% afterwards ($p < 0.001$).

⁶⁸When a Rwandan widow was asked whether she could forgive the people who had killed forty members of her extended family, she replied: “How can I forgive them when they haven’t apologised.” *A World in Your Ear* (BBC Radio 4, Nov. 29, 2002).

Figure 3: Fear of offender before and after treatment—Conference Victims

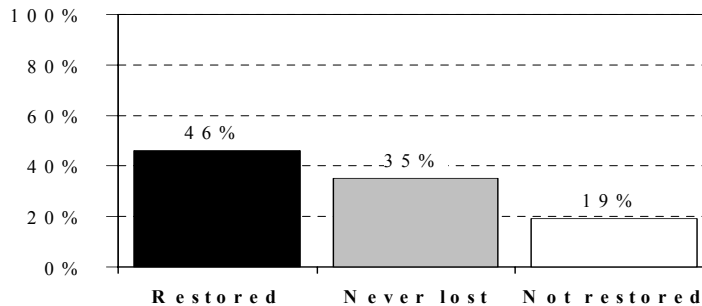


$t = 2.235, df = 81, p \leq .028; \text{Cohen's } d = .526$

4. Sense of Security

RISE victims who attended a conference were asked whether they felt their sense of security had been restored since the conference. While one-third said they had never lost it, almost half said that it had been restored (see Figure 4): this was especially apparent for victims of violence.

Figure 4: Effect of treatment on sense of security—Conference Victims



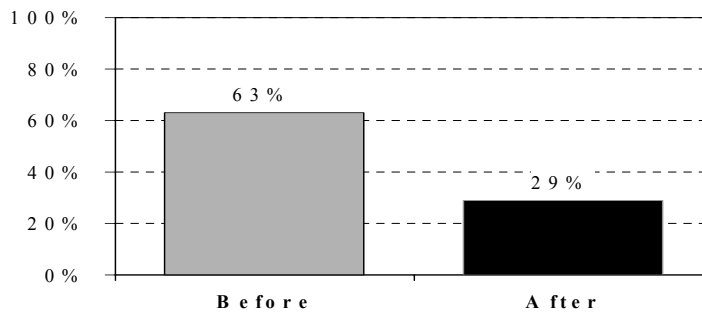
$t = 2.362, df = 79, p \leq .021$

5. Anger and Sympathy Towards the Offender

When RISE victims who attended a conference were asked how angry they felt towards their offenders before and after the conference, it was evident that the

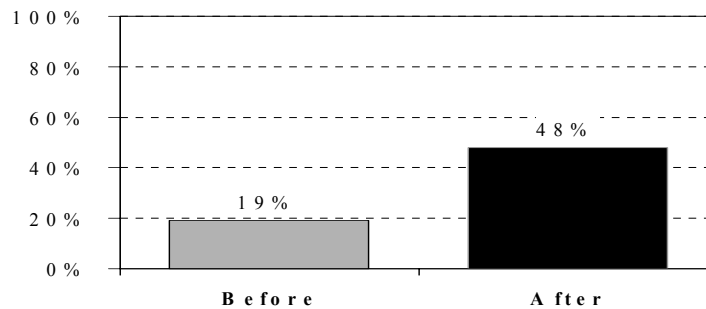
conference caused a significant reduction in anger (see Figure 5). There was a corresponding rise in feelings of sympathy after the conference compared with beforehand (see Figure 6).

Figure 5: Anger towards offender before and after treatment—Conference Victims



$t = 5.875$, $df = 81$, $p \leq .000$; Cohen's $d = .790$

Figure 6: Sympathy towards offender before and after treatment—Conference Victims



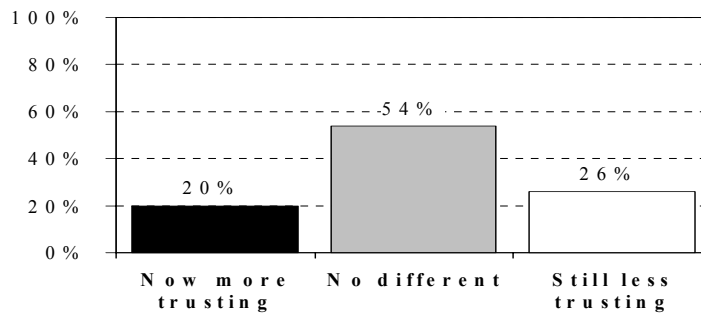
$t = -4.831$, $df = 79$, $p \leq .000$; Cohen's $d = .753$

6. Trust

The subject of trust and its loss was discussed repeatedly in RISE conferences. This was especially the case for the parents of young offenders who frequently commented on their feelings of being “let down” by their children and how much they regretted the loss of trust caused by the offence. Such acknowledgements in the conference settings provided ample illustration of the experience of victimization felt by those who care about the offenders, as well as

by the victims of their crimes. When victims who attended a conference were asked what effect the offence had had on their trust in other people, over half (56%) said they felt less trusting, but the conference had a beneficial effect on some of them (see Figure 7).

Figure 7: Effect of treatment on trust in others—Conference Victims

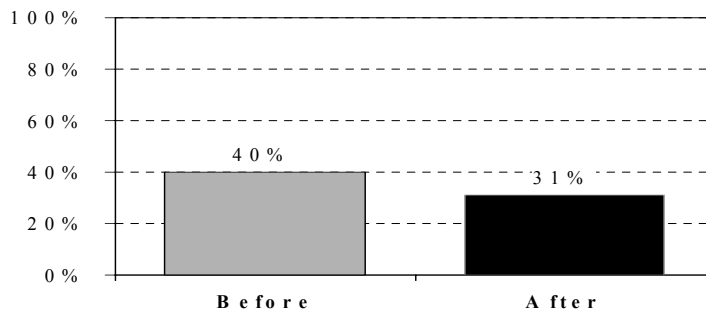


$$t = -.913, df = 80, p \leq .364$$

7. Anxiety

When RISE victims were asked how anxious they felt after the conference compared with beforehand, significantly fewer of them said they remained anxious afterwards (see Figure 8).

Figure 8: Effect of treatment on anxiety — Conference Victims

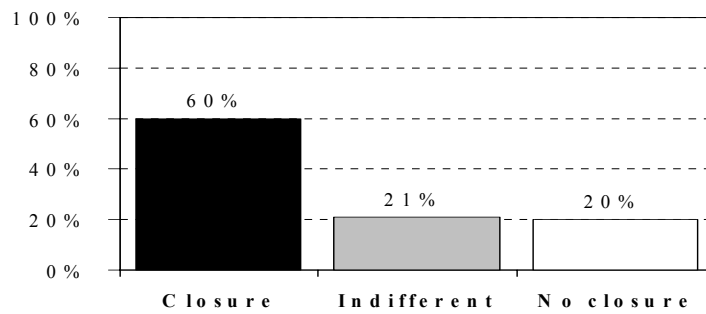


$$t = 2.402, df = 79, p \leq .019; \text{Cohen's } d = .211$$

8. Closure

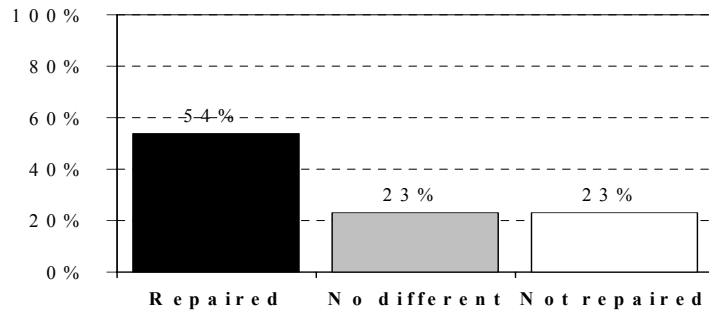
When RISE victims were asked whether the conference had made them feel they could put the offence behind them, three times as many agreed as disagreed (see Figure 9). A similar percentage felt that the conference had allowed the harm done by the offender to be repaired (see Figure 10).

Figure 9: Effect of treatment on sense of closure—Conference Victims



$t = 4.910, df = 81, p \leq .000$

Figure 10: Effect of treatment on repair of harm—Conference Victims



$t = 3.729, df = 81, p \leq .000$

D. Material Reparation

It seems victims may be more likely to obtain restitution through restorative justice than through the courts.⁶⁹ However, there is a difficulty in evaluating how well restorative justice restores, even on this apparently clear dimension. Even when material harm has occurred, it is not automatic that victims will view material restoration as the best way to remedy it, especially if the offender is impoverished or facing a term of imprisonment for the offence. Indeed, victims sometimes prefer to act generously rather than insist on restitution—an act of grace that may help more in their emotional recovery than any financial arrangement could achieve.

Evidence from RISE⁷⁰ indicates that neither courts nor restorative justice are particularly effective at delivering the financial reparation that victims believe to be fair. In this study the majority of victims, both in court cases and restorative justice cases, were awarded money less often than they said they should have been. The restorative justice group more often received some other form of material restitution, such as work by the offender for community organizations or for other people affected by the offence. When these victims were asked whether they believed they should have received any money from their offenders, significantly fewer of the victims who had experienced restorative justice than those whose cases went to court wanted money as an outcome in their cases. It appears that the experience of restorative justice affects victims' opinions about whether money constitutes an appropriate form of reparation for the offence.⁷¹

E. Fairness and Respect

When victims who have experienced restorative justice have been asked about whether they have been treated fairly, their responses are extraordinarily

⁶⁹See, e.g., UMBREIT ET AL., *supra* note 40, at 111–13 (finding that victims were more likely to receive material or financial reparation if agreement was negotiated directly between victim and offender rather than being imposed by court); see also ROBERT B. COATES & JOHN GEHM, VICTIM MEETS OFFENDER: AN EVALUATION OF VICTIM OFFENDER RECONCILIATION PROGRAMS 16–17 & fig.1 (1989) (noting that 87% of agreements contained some form of restitution, and offenders completed agreement in nearly 90% of cases).

⁷⁰For further description of these studies, see LAWRENCE W. SHERMAN ET AL., EXPERIMENTS IN RESTORATIVE POLICING: A PROGRESS REPORT ON THE CANBERRA REINTEGRATIVE SHAMING EXPERIMENTS (RISE) 9–52 (1998), at <http://www.aic.gov.au/rjustice/rise/progress/1998.html>; HEATHER STRANG ET AL., EXPERIMENTS IN RESTORATIVE POLICING: A PROGRESS REPORT ON THE CANBERRA REINTEGRATIVE SHAMING EXPERIMENTS (RISE) 7–28 (1999), at <http://www.aic.gov.au/rjustice/rise/progress/1999.html>.

⁷¹See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 24–26 (1999).

favorable.⁷² Results from RISE were no exception to earlier findings, though victims of property crime tended to be more satisfied overall than victims of violent crime. Around 90% of all victims responded that they had been treated fairly and respectfully. A further 92% said that all sides got a fair chance to bring out the facts at the conference, and only 11% said they had felt too intimidated to say what they felt. As far as the outcome was concerned, 85% of all victims said they believed the conference had taken account of what they said in deciding what should be done. Contrary to the expectations of some feminist writers that women would suffer a disadvantage in restorative justice settings, there was no difference in responses between men and women, including victims of violent offences. It appears that, at least in relation to nondomestic assaults as well as property offences, women do feel able to assert themselves and express themselves in the presence of their male offenders.

IV. DOES RESTORATIVE JUSTICE ENDANGER OFFENDERS' RIGHTS?

The evidence for victim benefits from restorative justice may mean little if the benefits come at the cost of risks to offenders' rights. Yet there is no evidence that such risks have been realized in any form of restorative justice. These forms include diversion of offenders from prosecution, as in Canberra, Indianapolis, and Bethlehem; restorative conferences before criminal sentencing so that sentences can be based on the result of the conference, now being tested in the United Kingdom and long practiced in New Zealand; restorative justice conferences in community sentences and in prison sentences, also under test in the U.K.⁷³ In none of these settings have offenders reportedly lost rights or had legal processes abused because of their voluntary participation in restorative justice proceedings. And while there is growing discussion of sentencing offenders to meet with victims as a condition of a community sentence (as an alternative to imprisonment), it is not clear that this alone would abuse the rights of an offender allowed to choose imprisonment rather than a meeting with a victim.

A. The Zero-Sum Game Assumption Is False

The activism of both victim advocates and offender advocates over the past thirty years has been soured by conservatives on both sides who characterize the

⁷²See, e.g., UMBREIT ET AL., *supra* note 40, at 84 fig.19 (finding that 83% of those in restorative justice program said they experienced fairness); see also MCCOLD & WACHTEL, *supra* note 61, at 52 exhibit 34 (finding 96% of restorative justice victims said they experienced fairness); EDMUND F. MCGARRELL ET AL., RETURNING JUSTICE TO THE COMMUNITY: THE INDIANAPOLIS RESTORATIVE JUSTICE EXPERIMENT 42 & 43 fig.6 (2000) (finding that over 90% of victims said they were satisfied with way their case was handled).

⁷³See Justice Research Consortium, *Frequently Asked Questions*, at <http://www.crim.upenn.edu/jrc/faq.html> (2001).

objectives of the other as moves in a zero-sum game, where any enhancement in the rights or interests of one is assumed to be at the expense of the other.⁷⁴ Both sides assume an inevitably win/lose character in all victim-offender transactions in the criminal justice system.⁷⁵

Critiques of restorative justice often make the same assumptions about victim-offender transactions in this setting. They usually refer to inherent dangers for both parties, but most often for the offenders.⁷⁶ From the victim standpoint, the concern usually centers around too much focus on the offender in programs aimed specifically at diverting offenders from prosecution.⁷⁷

The theoretical position of restorative justice is that win/lose can be avoided and transformed to win/win. This is because the chance for victims and offenders to confront one another directly ought to provide more opportunities for synergy of emotion than the court does. Indeed, an analysis of the views and attitudes of offenders and victims participating in RISE supports the theory. When the views of victims and offenders involved in these cases were compared, it was found that, contrary to the claims of zero-sum advocates, criminal justice is full of both win/win and lose/lose experiences, with win/win being more common in the restorative justice setting and lose/lose more common in courtroom justice.⁷⁸ Both of these outcomes are strongest for the dimensions of emotional harm, especially anger and vengefulness in the court, and emotional restoration, especially empathy in restorative justice. Win/lose occurs in a minority of cases in both settings, though much more often in court. It seems that win/lose is far from an inevitable outcome of criminal justice, and in fact in the restorative justice setting it occurred relatively rarely.

B. Offender Benefits from Restorative Justice

While offenders report that restorative justice conferences are stressful for them, stress alone is no violation of human rights—prosecution and trial are also

⁷⁴See ROBERT ELIAS, *THE POLITICS OF VICTIMISATION: VICTIMS, VICTIMOLOGY AND HUMAN RIGHTS* 231 (1986) (noting that victim advocates have “often championed victim policies invoked to strengthen government power and weaken defendants’ rights”).

⁷⁵See, e.g., Edna Erez, *Victim Participation in Sentencing: Rhetoric and Reality*, 18 J. CRIM. JUST. 19, 28–29 (1990) (discussing advocates’ positions); Danny Sandor, *The Thickening Blue Wedge in Juvenile Justice*, in *FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM?* 153, 155–57 (Christine Alder & Joy Wundersitz eds., 1994) (discussing stark division between victim and offender), available at <http://www.aic.gov.au/publications/lcj/family>.

⁷⁶Sharon Levrant et al., *Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?*, 45 CRIME & DELINQ. 3, 6 (1999) (“Conservatives endorse restorative justice as a means of securing more justice for victims. In so doing they often attempt to increase the punishment of offenders . . .”).

⁷⁷See Dignan, *supra* note 63, at 453–55.

⁷⁸STRANG, *supra* note 9, at 155–91.

stressful. The stress (or shame) of restorative justice conferences may be a necessary part of a reforming process that ultimately benefits the offender more than anyone.⁷⁹

Other benefits of restorative justice accrue to offenders without apparent stress.⁸⁰ Offenders derive an increased sense of respect from restorative justice processes. They may also discover how much their family or other intimates truly love them, despite their misconduct. By repaying the moral debt they owe to victims or to society, they may relieve their conscience about the harm they have caused. When they are diverted to restorative justice rather than being prosecuted, they can avoid a criminal record and its corollary disabilities in employment and travel. Sometimes the benefits of restorative justice to offenders seem so substantial that they have made victims' advocates, given their concerns about zero-sum criminal justice, suspicious of whether victims should even participate in restorative justice.

C. Victim Refusal of Restorative Justice

Perhaps the greatest risk of harm to offenders from restorative justice lies in its potential for inequity. If some victims are more merciful than others, or some victims are simply more willing than others to meet with offenders, then some offenders may gain advantages relative to other offenders. Yet the inequity from these different victim reactions to date has been far less severe than the inequities created by differences in sentencing patterns across judges. There seems to be no more prospect for eliminating this inequity than there is for eliminating inequities in all aspects of the present system, from police investigation to prosecution, sentencing, parole release, and parole violations.

It is fundamental to restorative justice theory and practice that everyone present at a meeting—offenders, victims, and the supporters of each of them—be there voluntarily. It is entirely probable that many victims are shocked at the prospect of coming face-to-face with their offender again when the idea is first presented to them, especially if the crime involved violence. Victim support organizations have expressed concerns about victims being coerced into such meetings,⁸¹ the more so if programs have the primary aim of reducing offender recidivism rather than helping victims. This emphasis has led to fears of victims being transformed from “court fodder” under the traditional court system, to

⁷⁹Nathan Harris, *Shaming and Shame: Regulating Drink-Driving*, in SHAME MANAGEMENT THROUGH REINTEGRATION 73, 199–207 (Alfred Blumstein & David Farrington eds., 2001).

⁸⁰STRANG ET AL., *supra* note 70, at 77–96.

⁸¹See CHRIS GEORGE, *Victim Support's Perspective on Restorative Justice*, PRISON SERVICE J., May 1999, at 12, 13.

“agents of offender rehabilitation” under restorative justice,⁸² and of new opportunities becoming nothing more than new obligations.⁸³

At the heart of restorative justice is the opportunity for victim and offender to discuss directly the offence, its consequences, and the remedies for the offence that the offender might perform. If victims refuse to attend a meeting, a potential dilemma arises if normatively it is assumed that such a meeting would represent a good for the offender. It could be deemed unethical to disadvantage an offender because “their” victim declined to participate. But imaginative alternatives are possible. For example, when victims refuse to attend, restorative conferences might be modified to focus on the opportunities they may present to provide insights for the offender on the consequences of his or her actions.

In sum, it is always useful to look for signs of danger to offenders’ rights from any innovation in justice processes. So far there has been much looking for ways in which restorative justice violates the rights of both offenders and victims. Little evidence of any harm, and no violations of civil rights, can be found to date.

V. DOES RESTORATIVE JUSTICE ENDANGER COMMUNITIES BY INCREASING CRIME?

The final fear about restorative justice is that it may endanger communities by causing more crime. A jurisprudence of crime prevention may conclude that restorative justice is suspect on both theoretical and empirical grounds. The theoretical grounds include both general and specific deterrence. The empirical tests to date, however, are limited to specific deterrence.

In theory, it is firm and consistent punishment of crime that deters potential offenders from committing crimes. In classical economics, the causal mechanism of this theory is a rational choice in favor of the cost-benefit ratios of compliance with the law, relative to the cost-benefit ratios of breaking the law. If restorative justice is perceived as lowering the costs of lawbreaking, the general deterrence theory would predict that crime rates would go up. Similarly, if the offenders who commit crimes experience restorative justice as less painful than conventional justice, they may calculate that the costs of repeat offending have been lowered and thus increase their rates of repeat offending.

The evidence to date consistently falsifies the specific deterrence hypothesis about restorative justice. In seven of seven randomized field trials of restorative justice diversions from prosecution, the diversion program has worked at least as well as prosecution in control of repeat offending. And in two of the trials, restorative justice has clearly done better than prosecution at preventing repeat

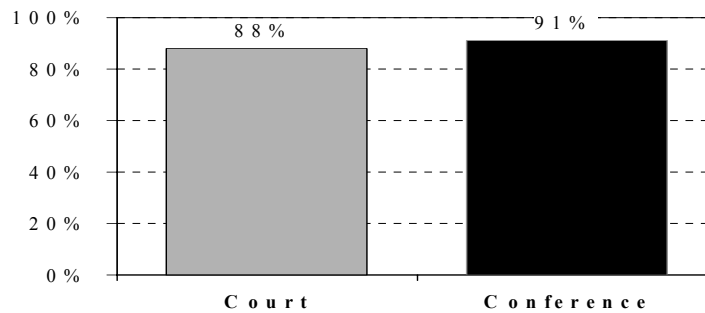
⁸²Andrew Ashworth, *Victims’ Rights, Defendants’ Rights and Criminal Procedure*, in INTEGRATING A VICTIM PERSPECTIVE, *supra* note 1, at 185, 199.

⁸³Reeves & Mulley, *supra* note 10, at 138.

offending.⁸⁴ While there have been no tests of the general deterrence hypothesis about restorative justice, the plausibility of that hypothesis is arguably weakened by the findings about repeat offending.

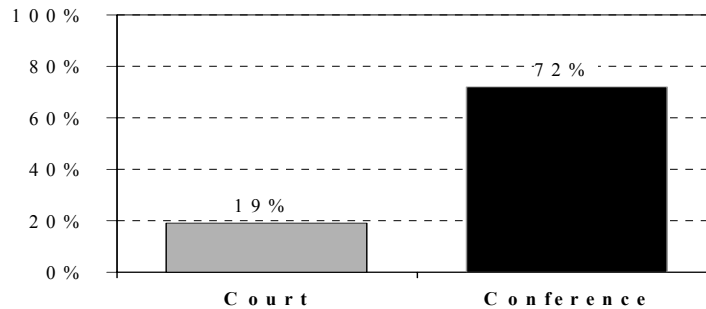
The reduction, rather than increase, in crime that restorative justice can cause includes a reduction in crimes of vengeance committed by victims. In the RISE interviews of violence victims, those who had met with their offender in a restorative justice conference were far less likely to want to harm their offender than those whose cases had been prosecuted in court (9% vs. 45%). This reduction in the desire for vengeance even applied to victims who were only offered a conference, without actually receiving a conference; those victims were also more likely than court case victims to receive an apology from the offender (see Figures 11 & 12).

Figure 11: Felt should have received an apology
— All Victims



$$\chi^2 = .403, df = 1, p \leq .673; \text{Cohen's } d = .149$$

⁸⁴MCGARRELL ET AL., *supra* note 72, at 48–49; LAWRENCE W. SHERMAN ET AL., RECIDIVISM PATTERNS IN THE CANBERRA REINTEGRATIVE SHAMING EXPERIMENTS 12–15 & figs.1–10 (2000), at <http://www.aic.gov.au/rjustice/RISE/recidivism/report.pdf>.

Figure 12: Received an apology—All Victims

$$\chi^2 = 66.772, df = 1, p \leq .000; \text{Cohen's } d = 1.333$$

An even stronger response to the concerns about public safety is that restorative justice does not have to be mutually exclusive with retributive or conventional justice. The current randomized field trials in the United Kingdom are all testing supplements to conventional justice, rather than substitutes.

Until very recently, restorative justice has been viewed principally as an innovation to be used mainly with young offenders at the beginning of their criminal careers. As a result, most programs around the world entail the diversion of juvenile offenders from normal court processing, and it is these kind of programs that most is known about.⁸⁵ However, research to date has shown that, contrary to conventional wisdom, restorative justice is more effective in reducing violent crime than property crime:⁸⁶ indeed, it may be the case that the greatest benefit from restorative justice is found in the most serious crimes. It appears that the higher level of emotional engagement by victims and offenders in these kinds of encounters is the “engine” leading to the emotions of empathy and remorse which may be the essential ingredients for reduced reoffending.

This finding has led to greater interest in exploring the potential of restorative justice with serious violent crime.⁸⁷ Given the uncertainty of knowledge about the effects of the intervention for these kinds of offences, the United Kingdom studies aim to assess the effects of adding restorative justice to normal court-based criminal justice processing of these kinds of offenders, either

⁸⁵See McCOLD & WACHTEL, *supra* note 61, at 16–17 (describing Bethlehem Police Department juvenile diversion program); MCGARRELL ET AL., *supra* note 72, at 30–35 (describing Indianapolis diversion program).

⁸⁶See SHERMAN ET AL., *supra* note 84, at 12 & figs.1–2, 7–10, & 14–15.

⁸⁷The authors are presently directing a series of restorative justice experiments measuring the victim benefits and crime reduction effects of this intervention for robbery-street crime and burglary, including burglary with violence prior to sentencing, and for all forms of nondomestic and nonsexual violent crime post-sentence for offenders serving custodial sentences for these crimes.

at the point between a plea of guilty and the sentence decision, or post-sentence among offenders serving terms of imprisonment for their crimes. The studies are a randomised design in which eligible cases are assigned either to the “normal” process, or to the addition of a restorative justice conference to the “normal” process. In the pre-sentence cases, the outcome agreed between participants at the restorative justice conference is placed before the judge so as to inform the sentencing decision; this may entail financial repayment for material harm, apologies, community work, participation in alcohol or drug programs, or any other just and appropriate outcome agreed to by everyone, including the offender. In the post-sentence cases, the outcome is simply a private agreement, with elements similar to those in the pre-sentence cases, which has no impact on the offender’s sentence. It is anticipated that indications of the effects on reoffending of these programs will be available by early 2004.⁸⁸

The United Kingdom tests simultaneously feature the largest and smallest risks to community safety from restorative justice. The largest risk is that restorative processes will somehow increase repeat offending more with more serious offence types. The smallest risk is that offenders will recalculate the costs and benefits of crime. Adding on restorative to conventional justice simply increases the total cost of crime to an offender, rather than reducing it. Facing an angry victim as well as going to prison creates a net increase in penalty, unless restorative justice is treated by judges as a mitigating factor or even an alternative to incarceration. Although the current Lord Chief Justice of England and Wales has recommended treating restorative justice that way,⁸⁹ there is no evidence to date that sentencing patterns by judges have been altered with the addition of restorative justice before sentencing.

In sum, there is only theory to suggest that restorative justice may cause more crime. All of the available evidence contradicts that theory. While new evidence may emerge at any time, the current balance of evidence raises important questions about a burden of proof.

VI. CONCLUSION: THE BURDEN OF PROOF

The proponents of a new jurisprudence are typically obliged to carry the burden of proof in favor of their proposal. This is clearly justified by the risks to the legitimacy of law from any changes, no matter how sound the changes may

⁸⁸Justice Research Consortium, *Frequently Asked Questions*, at <http://www.crim.upenn.edu/jrc/faq.html> (2001).

⁸⁹Lord Woolf, Lord Chief Justice of England & Wales, Restorative Justice, Speech to the Youth Justice Board at the Church House Conference Centre (Oct. 25, 2001) (discussing usefulness of restorative justice in breaking “vicious cycle of repetition of offending, punishment, release, reoffending and punishment again”), *available at* <http://www.lcd.gov.uk/judicial/speeches/lcj251001.htm>.

appear in theory. Just as the Food and Drug Administration must approve the marketing of new drugs on the basis of human testing showing the drugs to be safe and effective, professors of jurisprudence should only approve innovations in law found equally safe and effective.

The question for both new medicines and new law is what the comparison point should be. In medicine, the comparison is prevailing practice. If a new drug does *better* than existing drugs at curing a disease, it is approved for marketing. But it may also be approved if the new drug does no *worse* than existing drugs. Then patients and doctors may choose among a wider range of drugs to find one most suited to the individual patient's needs.

From a victim perspective, restorative justice has been shown usually to do better than the existing criminal justice system. It has met the burden of proof for benefiting one stakeholder in the process of justice. It might arguably lose that status if it is found that restorative justice also hurts offenders or communities. But in thousands of restorative justice conferences on three continents, no clear evidence has yet emerged that restorative justice has such negative side effects.

Given the substantial evidence of unfairness and disrespect in the treatment of victims by criminal justice, restorative justice seems to be in a prime position to alleviate that problem. Arguments may be made against that claim in theory. But the evidence from practice lends little support to the theoretical objections. The sooner criminal justice opens its doors to victim participation in restorative justice, the sooner we can start to repair the harm from nine centuries of leaving victims behind.