Mennonite
Central
Committee

MCC U.S. Office of Criminal Justice
220 W. High Street
Elkhart, IN 46516
U.S.A.

MCC Canada Victim Offender Ministries Program
50 Kent Avenue
Kitchener, ON N2G 3R1
Canada

Justice: The Restorative Vision

New Perspectives on Crime and Justice
Occasional Papers of the
MCC Canada Victim Offender Ministries Program
and the MCC U.S. Office of Criminal Justice

February 1989 Issue No. 7

At the 1988 annual meeting of the American Society of Criminology, Harry Mika of Central Michigan University organized a session entitled "Restorative Justice: From Theory to Practice." This issue of the "Occasional Papers" reproduces three of the papers which were presented there.

Dan Van Ness' paper has been revised slightly since its presentation. Although the revisions probably would not alter M. Kay Harris' comments in a major way, they would have modified her emphases somewhat. Nevertheless, in order to make these available quickly we have decided to print her response in its original form.

M. Kay Harris is Associate Professor in the Department of Criminal Justice at Temple University, Philadelphia, PA.

Dan W. Van Ness is President of Justice Fellowship, Washington D.C.

Howard Zehr is Director of the MCC U.S. Office of Criminal Justice, Elkhart, IN.

New Perpsectives on Crime and Justice are issued irregularly as a means of sharing important papers and perspectives. These "Occasional Papers" are sponsored jointly by the MCC U.S. Office of Criminal Justice and the MCC Canada Victim Offender Ministries Program. For additional copies, permission to reprint or a list of other available resources, contact either of the above programs of Mennonite Central Committee (addresses listed on back cover).

Justice: The Restorative Vision

MCC U.S. Office of Criminal Justice
MCC Canada Victim Offender Ministries Program
1989

Justice: Stumbling Toward a Restorative Ideal

Howard Zehr

Several years ago I sat in an American courtroom with a 17-year-old defendant. I had been asked by his family and his attorney to develop a sentencing proposal for the court's consideration.

The events which had led up to this day were tragic. This young man (he was 16 at the time) had used a knife to rob a young woman in a dark hallway. He and his girl friend needed money in order to escape what they viewed as an untenable family situation. Watching television had led him to believe that when confronted, the victim would simply hand over her money. At the same time, he would teach this "uppity" woman, who had refused to talk with him on an earlier occasion, a lesson.

Unfortunately real life does not always parallel television. In this dark hallway both victim and offender panicked. The young woman lost an eye; he was arrested and now, months later, was waiting to hear his fate.

This young man had no previous record of violence but had committed a very serious crime. I recommended a sentence which included community service, restitution to the victim, counseling, employment and specific living requirements, plus both supervision and some custody. The judge, however, imposed his own sentence: 20-85 years in prison, with no possibility of early release. The defendant would be at least 37 - nearly middle-aged - when he emerged.

Before pronouncing sentence, the judge surveyed all of the usual - and often mutually contradictory - objectives which are given for sentencing. In the end, however, the need for punishment seemed to

be the primary justification for such a sentence. In the 1980s, that rationale is sufficient.

During the past several decades, the U.S. has experienced what appears on the surface to be a major shift in the philosophy of sentencing. Rehabilitation is now out of fashion; punishment is definitely in.

An unholy alliance of liberals and conservatives made possible the victory of a just deserts philosophy. Conservatives always did want to punish. Liberals were fed up with the many abuses and failures of the rehabilitative system. Call a spade a spade, they agreed: the aim of sentences should be to punish, but to do so predictably, proportionately, equitably.

The just deserts approach has led to a variety of determinant and mandatory sentencing schemes intended to reduce discretion on the part of judges, thus minimizing discriminatory and arbitrary sentences. But instead of eliminating discretion, these sentencing schemes simply shifted discretion to other parts of the criminal justice system, parts which are even less visible and less accountable, while making sentences more rigid. Discretion is not gone; it is simply more hidden and less available for mitigating harsh sentences. Our prisons continue to be disproportionately populated by minorities.

Contrary to the hopes of liberals, just deserts in practice meant harsher sentences. Consequently, a second result of this "get-tough" approach to crime has been high incarceration rates and crowding on a massive scale.

Included in these figures is our young offender. In passing sentence, the judge commented, "I hope by the time you come out you will be less likely to turn to violence." What naivete! What he is likely to actually experience during those 20 plus years in prison - and what he is likely to be like as a result - is fairly obvious.

The death penalty also is back with a vengeance. The numbers on death rows are such that if we executed one person every day (including Sundays), it would take 5 1/2 years to kill those currently sentenced to death. This does not count those who are being added; we would need to kill an additional person every day and a half to keep up with these new additions. (LDF)

We are committed to punishing by death even though there is absolutely no evidence that the death penalty deters potential offenders, even though there is evidence that the example of the death penalty actually causes some people to kill. We are willing to execute even though it has been clearly demonstrated that the penalty of death is unfairly imposed on the basis of race, even though the financial costs have been shown to be higher than costs of life imprisonment, even though we know that we sometimes make mistakes. We are that committed to punishment. (Cf. Haas & Inciardi, 1988)

Even when we claimed we were rehabilitating we usually punished. Perhaps it is more honest to admit what we are in fact doing. Still, in abandoning rehabilitation we eliminated something that may in the long run be more important than anything else: we eliminated humane motives for treating offenders. If our purpose is first and foremost to punish, what motive is there for treating offenders and prisoners fairly and humanely? To what values can we appeal? The lack of a humane motive ultimately may have more serious implications than prison crowding or sentencing inequity.

As I recall, the judge in our case talked about the need to make the offender accountable. By that he meant having him take his medicine, "paying his debt to society" by putting in his time (ironically, at society's expense). Will that help him understand the human consequences of what he has done? Will it help him to take responsibility for what he has done? Hardly. We punish, but we don't hold truly accountable in any meaningful sense of the word.

A variety of alternatives to prison have seemed to offer promise in the twentieth century. Although they occasionally served as real alternatives, usually they have simply been alternatives to alternatives, or alternatives to nothing. Sometimes they have been as bad or worse than what they claimed to replace. (Cf. Rothman, 1980; Feeley, 1983)

The result has been a fair amount of cynicism about possibilities for change. While alternatives have multiplied, the prison population has mushroomed. Instead of reducing prison populations, the overall system has expanded, with even more people in the criminal justice system.

A variety of new "solutions" are being offered today. Some look to the privatisation of prisons. Electronic monitoring is spreading willy-nilly, with little testing or accountability. Intensive probation is popular. All of these promise new ways to punish but few promise long-range solutions. The implications of some are downright frightening.

Punishment, in short, has failed to live up to its promise.

A second major area of crisis is rooted in the long-term neglect of crime victims.

In some ways, this decade has been the era of the crime victim. Finally, there has been some recognition for crime victims, some attempt to provide them with help, some understanding of what they experience. And what they experience at the hands of the offender, then often at the hands of the "system," can be truly devastating. They certainly deserve this attention.

Victimization is a truly devastating experience that affects many areas of a person's life. (Cf. Bard & Sangrey, 1986; Neiderback, 1986) It often involves extreme feelings of fear, of powerlessness, of guilt, of self-blame. Victimization generates anger at the offender

who did this, but anger also at one's self, at the system, at God. It affects most areas of life - work, play, family, marriage - and can stay with one for the remainder of one's life.

That crime is traumatic is easily acknowledged for crimes that society treats as serious. Yet the experience of crime can be nearly as traumatic for victims of crimes which society treats as minor: burglary victims, for example, often sound much like rape victims in relating their experiences.

Crime, even seemingly minor crime, is often deeply traumatic, and is so because crime violates a person's very sense of self. Crime attacks two basic beliefs on which people base their lives: the belief that the world can be trusted to be orderly, and the belief that each of us is an autonomous individual with power over our own life.

People need to live in a world which is basically predictable and orderly. When things happen, they need explanations because explanations restore a sense of order. When things happen, then, people ask "why?"

Crime upsets this sense of orderliness and trust. It knocks out the props, making victims wonder what they can trust and what they know. That is why crime victims, like cancer victims, ask "Why me?" That is the reason answers are so important: answers restore order, and order is a key to psychological equilibrium.

To be whole, people also need to feel like they are in control of their own lives. Denied personal power, individuals feel less than human. When crime occurs, someone takes power over another's life, making them feel diminished, less than fully human. To be healed, then, victims need to regain a sense of control over their own lives.

In short, crime, even "minor" crime, is traumatic because it threatens people's sense of themselves as autonomous individuals in a predictable world.

Crime victims have many needs. The following are only a few.

Victims badly need an experience of justice. This may have many dimensions. Often it is assumed that vengeance is part of this need, but this is not necessarily so; the need for vengeance may often grow out of justice denied. The experience of justice seems to include assurance that what happened to the victim was wrong, that it was unfair, that it was undeserved. Victims need to know that something is being done to make sure that the offense does not recur. Often they feel some need for restitution, not simply for the actual compensation it represents but also for the statement of vindication that is implied.

Victims want answers. In fact, crime victims often rate the need for answers above needs for compensation. Why me? What could I have done differently? Questions such as these bedevil victims. Without answers, it can be very difficult to recover.

Victims also need opportunities to vent their feelings to friends, to neighbors, to law enforcement people, perhaps above all to the one who caused this pain. They need chances to "tell the truth" of what happened to them.

Finally, victims need to be empowered. Power has been taken from them. To be healed, some sense of power must be restored.

Unfortunately, these needs are rarely met in the usual experience of justice. Rarely do victims find out what really happened. Rarely are they able to vent their feelings as they would wish. Rarely do they receive compensation or even full information about their cases. Rarely are they involved in their own cases unless they are needed as witnesses. Instead of having power returned to them, in other words, power is further denied in the criminal justice process. Twice victimized, victims feel; instead of being healed, the wound is compounded. Consequently, victims retain their wounds, often for years.

Today there are a variety of assistance and compensation programs for victims. Most victims, however, do not receive such assistance. Victim programs remain on the margins, available to only a few and considered to be peripheral to justice.

Why are crime victims so neglected? Why is punishment so ineffective, so counterproductive? Why have alternatives not been alternatives? The reason, I suspect, is that we have failed to ask fundamental questions. We have failed to examine and question the underlying assumptions, the paradigm, under which we operate. It is as if we have been reaching into a dark box, moving things around inside, without asking whether this is the right box.

We have asked <u>which</u> punishment, but we have not asked <u>whether</u> punishment. We have sought alternative punishments, but not alternatives to punishment. We have assumed that the infliction of pain is normative and central, whether in the name of punishment or rehabilitation. (Cf. Christie, 1981; Harris, 1983-84).

Second, we have not seriously questioned what crime <u>means</u>. Instead, we have accepted the legal understanding of crime which defines crime as breaking rules, a violation of the state.

Finally, we have not seriously examined the appropriate role of the state in administering justice. Instead, we have assumed that crime is solely the state's responsibility, indeed that the response to crime is the state's monopoly.

The so-called criminal justice system has failed on numerous fronts, and its failures are grounded in the "retributive paradigm" on which it is based. The retributive paradigm defines crime first and foremost as rule-breaking. It defines the state, not the individual, as the victim. This paradigm understands justice to be the administration of pain, pain in measured doses, all guided by right rules. It assumes that the state - and only the state - is responsible to respond to crime.

It is not surprising, then, that victims are so neglected, that they are so peripheral to the process: they are not included in the equation. Crime is a matter between state and offender. The offender is the passive recipient of "justice," and the victim is on the outside, involved primarily if needed by the state.

This "retributive paradigm" governs our understandings of crime and justice today, but it is not the only paradigm available. In fact, it has not been the predominant model for most of our history.

Throughout most of western history, crime has been understood as an offense of person against person, much like other conflicts and wrongs which are treated as "civil." Throughout most of this history, people have assumed that the central response must be to somehow make things right; restitution and compensation were very common, perhaps normative. Crime created obligations, liabilities, that needed to be taken care of, usually through a process of negotiation. Acts of vengeance could occur, but not, it appears, as frequently as is usually assumed and the functions of vengeance may have been different than we expect. Both victim and offender had a responsibility in this process, as did the community. The state had a role as well, but it was limited and was by necessity responsive to the wishes of victims.

This is a gross simplification, of course, but to some extent our history has been a dialectic between two models of justice: state justice and "community" justice. (Cf. Lenman & Parker, 1980) State justice was imposed justice, punitive justice, hierarchical justice. Community justice was negotiated justice, restitutive justice.

State justice has operated in some form during most of western history. However, community justice predominated until fairly recently. Only in the past few centuries did state justice win out. The state won a monopoly on justice, but only with a great fight. (Berman, 1983) The victory of state justice constituted a legal

revolution of tremendous import, but a revolution which has been recognized and studied too infrequently.

The dimensions of this legal revolution were many but included three particularly important developments:

1. The division of conflicts and harms into two different spheres - civil and criminal - with quite different operating assumptions and rules in each.
2. The centrality of the state when wrongs are defined as criminal.
3. The expectation of punishment - pain infliction - in the criminal sphere.

It is no accident that the birth of prisons - a new technology for delivering doses of pain - coincided with this legal revolution.

Community justice was one paradigm from our past. Another is biblical justice. Not only our own immediate history but also the Judeo-Christian tradition leads in a different direction than the retributive paradigm.

The Bible is often cited as a foundation for our way of doing justice: "an eye for an eye, a tooth for a tooth," sayeth the Lord. But there is more to "an eye for an eye" than meets the eye. It was not intended as a command to do vengeance, but a limitation on vengeance. Moreover, it was not the governing paradigm of the Old Testament. In fact, the phrase only occurs three times in the Old Testament. Then, in the New Testament, Christ specifically rejects this theme: "you have heard it said, 'an eye for an eye,'...but I tell you, love your enemy."

The leading paradigm of the Older Testament is more accurately found in how God is understood to respond to wrongdoing. When confronted by sin, God is described as full of wrath, with words that connote heat, heavy breathing. Like crime victims, God is under-

stood to be angry. But the underlying theme is that in spite of this wrongdoing, and in spite of the resulting anger, God never gives up. Restoration, not retribution, is the paradigm of biblical justice.

In the Old Testament, God's overall intent is captured in the word "shalom." (Yoder, 1987) Shalom implies peace but goes beyond the usual understanding to mean people living in right relationship with one another - materially, socially, spiritually. The essence of crime is that it upsets shalom, making right relationships impossible. Crime, in the biblical view, is a wound that requires healing. That is why restitution, making things right, is found so often there. In fact, the word for making things right is the root word for shalom. In the New Testament, therefore, Christ's focus on restorative responses rather than retribution is thus quite logical, and not a rejection of the overall thrust of the earlier Old Testament material.

What is to be learned from all this? Not, of course, that all was rosy in the days gone by or that we can recreate a lost world. What we can learn is that we must question our paradigms and imagine that there are other possibilities. Perhaps we can begin to develop a different, restorative, lens for viewing crime and punishment.

Much crime is, after all, in reality what our ancestors assumed it was: a violation of people by people. Harm is personal, not abstract, and it creates obligations to make right. And if that is true, then reparation ought to be at the center of justice.

The retributive model and a reparative alternative might be summarized like this:

Retributive Justice

1. Crime violates the state and its laws.
2. Justice focuses on determining blame
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, and 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 insofar as possible, things can be made right.
4. Justice encourages negotiation and an exchange of information,
5. gives victims and offenders central roles,
6. and is judged by the extent to which responsibilities are assumed, needs are met and healing (of individuals and relationships) is encouraged.

This is not the place to explore the many implications of such a vision; perhaps, indeed, the formulation is seriously flawed. What is important is that we free ourselves to ask fundamental questions.

However, it does seem important that alternate formulations take into account the existential reality of crime: that what we call crime involves actual harms and conflicts and belongs therefore on a continuum which includes other "civil" harms and conflicts. Obligations result. Both victim and offender are part of the problem and therefore both must be part of the resolution. Resolutions must take into account needs - especially victim needs, but also those of the offender - and should seek to repair. Instead of asking "Who did it? What do they deserve?" the primary questions should be "What has been hurt? What can be done to make things right?" Actual harms and conflicts should be given their rightful place in our understanding of crime, and the search for reparative solutions should take precedence over pain-infliction.

At issue is what is normative rather than what would present a realistic response in all situations. The current paradigm is shaped

around the most unusual, bizarre offenses, making procedures for such cases normative for "ordinary" ones. Some offenders are dangerous and must be restrained. Some offenses are so serious that special procedures are warranted. But these special cases need not set the norm.

What is important is that we recognize the importance of the paradigms we use, and that we free ourselves to question these paradigms. Restorative justice is one possibility which challenges our assumptions. It is, however, hardly a paradigm at this point; at most, it can serve as a "sensitizing theory." Perhaps it can at least serve to make us think carefully before we impose pain. Low incarceration rates in the Netherlands have, in a recent study, been attributed not so much to any particular philosophy of "corrections" as to a "bad conscience" about prison. (De Haan, 1987) A generation of jurists was shaped both by the experience of imprisonment at the hands of the Nazi's and a law curriculum which questioned punishment. The result was a hesitancy to impose pain in the form of imprisonment. If nothing else, perhaps our discussions can contribute to a milieu in which the infliction of pain is seen as a last resort, a failure of other options, rather than the hub of justice.

As we experiment with new "alternatives," it will be essential that we be guided by a vision, but also that we be aware of tensions between our values and those of the existing, retributive system. Davis, Boucherat and Watson's recent study of victim-offender mediation programs in England warns of the dangers of ignoring value questions and of tacking new experiments, even (or especially) reparative ones, on to the existing criminal justice system. (Davis et. al., 1987) A new understanding and a new language of justice is needed, and they call for research which will shape and test the viability of a reparative paradigm.

References and Select Bibliography

Auerbach, Jerold S. (1983). **Justice Without Law?** New York & Oxford: Oxford University Press.

Bard, Morton and Sangrey, Dawn. (1986). **The Crime Victim's Book.** Brunner- Mazel, Second Edition.

Barnett, Randy. (1981). *Restitution: A Paradigm of Criminal Justice.* In Burt Galaway and Joe Hudson, editors, **Perspectives on Crime Victims.** St. Louis: C.V. Mosby Co.

Berman, Harold J. (1983). **Law and Revolution: The Formation of the Western Legal Tradition.** Cambridge, Mass: Harvard University Press.

Bianchi, Herman, and van Swaaningen, Rene. (1986). **Towards a Non-Repressive Approach to Crime.** Amsterdam: Free University Press.

Blad, John R.; van Mastrigt, Hans; Uildriks, Niels A., editors. (1987). **The Criminal Justice System as a Social Problem: An Abolitionist Perspective.** Rotterdam, Netherlands: Erasmus Universiteit.

Boecker, Hans Jochen. (1980). **Law and the Administration of Justice in the Old Testament and Ancient East.** Translated by Jeremy Moiser. Minneapolis: Augsburg Publishing House.

Christie, Nils. (1984). **Crime, Pain and Death in New Perspectives on Crime and Justice: Occasional Papers** Issue 1. Akron, Pennsylvania: Mennonite Central Committee.

Christie, Nils. (1981). **Limits to Pain.** Oslo: Universitetsforlaget.

Contemporary Crises: Law, Crime and Social Policy. Vol. 10, No. 1, (1986). Dordrecht/Boston/Lancaster: Martinus Nijohff Publishers.

Cullen, Francis T. and Gilbert, Karen E. (1982). **Reaffirming Rehabilitation.** Cincinnati, Ohio: Anderson Publishing Company.

Davis, Gwynn, Boucherat, Jacky and Watson, David. (1987). **A Preliminary Study of Victim Offender Mediation and Reparation Schemes in England and Wales.** Research and Planning Unit Paper 42. London: Home Office.

De Haan, Willem. (1987). *Abolitionism and the Politics of 'Bad Conscience'*. **The Howard Journal of Criminal Justice.** Vol. 26, No. 1, February.

Feeley, Malcolm M. (1983). **Court Reform on Trial: Why Simple Solutions Fail.** New York: Basic Books.

Gaylin, Willard; Glasser, Ira; Marcus, Steven and Rothman, David J. (1981). **Doing Good: The Limits of Benevolence.** New York: Pantheon Books.

Haas, Kenneth C., and Inciardi, James A., editors. (1988). Challenging **Capital Punishment: Legal and Social Science Approaches.** Newbury Park, California: Sage Publications.

Harris, M. Kay. (1983-84). *Strategies, Values, and the Emerging Generation of Alternatives to Incarceration.* **New York University Review of Law and Social Change,** Vol. XII, No. 1, pp. 141-170.

Lenman, Bruce and Parker, Geoffrey. *The State, the Community and the Criminal Law in Early Modern Europe,* in Gatrell, et al, **Crime and the Law: The Social History of Crime in Western Europe Since 1500.**

Leshan, Lawrence and Margenau, Henry. (1982). **Einstein's Space and Van Gogh's Sky: Physical Reality and Beyond.** New York: Collier Books/Macmillan Publishing Company.

NAACP Legal Defense and Educational Fund, Inc. (LDF). **Death Row, U.S.A.** Quarterly Publication. New York.

Neiderbach, Shelley. (1986). **Invisible Wounds: Crime Victims Speak.** New York: The Hayworth Press.

Rothman, David T. (1980). **Conscience and Convenience: The Asylum and Its Alternatives in Progressive America.** Boston: Little, Brown and Company.

Stephens, Gene. *Participatory Justice: The Politics of the Future.* **Justice Quarterly** (Omaha, NE), 3(1):67-82, 1986.

Van Ness, Dan. (1986). **Crime and Its Victims.** Downers Grove: Intervarsity Press.

Wright, Martin. (1982). **Making Good: Prisons, Punishment and Beyond.** London: Burnett Books Ltd.

Yoder, Perry B. (1987). **Shalom: The Bible's Word for Salvation, Justice, and Peace.** Newton, KS: Faith and Life Press.

Zehr, Howard. (1985). **Retributive Justice, Restorative Justice** in **New Perspectives on Crime and Justice: Occasional Papers** Issue 4. September. Akron, Pennsylvania: Mennonite Central Committee.

Pursuing a Restorative Vision of Justice

Daniel W. Van Ness

We are all familiar with the fairy tale "The Emperor's New Clothes" in which a vain ruler is swindled into buying supposedly magical garments, clothing that cannot be seen by fools or by those unfit to hold office. Neither the emperor nor his attendants will admit that they can see nothing, and the king actually parades down main street clothed only in his foolishness. It is not until a child laughs "The emperor has no clothes!" that those in the crowd will admit that they cannot see the clothing either. The king is exposed (literally) as a proud and foolish man.

Many students of America's criminal justice system have experienced a similar moment of enlightenment, what Randy Barnett (1977) has called a "paradigm shift". Criminal justice approaches that before seemed appropriate are now exposed as unsound. Criminal justice problems that once seemed not only intractable but unexplainable turn out to be consequences of a now obvious foundational problem.

We reach this moment of insight along different paths. Perhaps the most painful is the one traveled by crime victims. Let me illustrate with a true story. While washing his car one day, John was attacked by a younger man who broke his arm and stole his car. The police subsequently arrested the offender and recovered John's slightly-damaged vehicle.

John and his wife were told that they would be kept informed on the progress of the case, but were not. They missed virtually every important hearing either because no one told them the times and dates, or because the hearings were rescheduled without warning. The couple finally decided to meet with the prosecutor to find out why they were being so badly treated. The answer they received was blunt: "You are not part of this case; you just happened to be the

victims. This was an offense against the state, and that's how we handle it."

The official's brutally frank (and legally correct) answer shows how skewed the Western view of crime and justice has become. Rather than formally acknowledging that crime causes injuries to victims, our laws define it as only an offense against government. Victims are not parties in criminal cases. They are merely evidence for the prosecution.

Not only does this fly in the face of common sense, it runs counter to ancient Hebrew, Greek and Roman legal traditions — the very traditions upon which we rely so heavily for our understanding of justice. These societies understood crime primarily as an offense against victims and their kin, within the context of community. The community held offenders accountable to victims not only to avoid endless cycles of revenge and violence, but also to restore peace to the community.

We see this reflected in the Hebrew words for peace *(shalom)*, restitution *(shillum)*, and recompense *(shillem)*. Each came from the same root; each concept was inter-connected. Restitution was essential because it held offenders accountable for the injuries they had inflicted on the victims. Recompense, sometimes translated "retribution" (not in the sense of revenge, but in the sense of satisfaction), vindicated community values. Each contributed to the process of restoring peace (shalom) to the community.

In contrast, contemporary criminal justice is preoccupied with maintaining public order and punishing offenders, while balancing offenders' rights with governmental power. Victims are ignored, and government has usurped the appropriate role of the community in maintaining peace.

The reasons for this change have been explored elsewhere at considerable length (Berman, 1983; Van Ness, 1986). It is clear that the move to state-centered criminal justice was not the result of new

discoveries in crime prevention and adjudication. It occurred as part of an effort to expand the political power of national governments over local authorities.

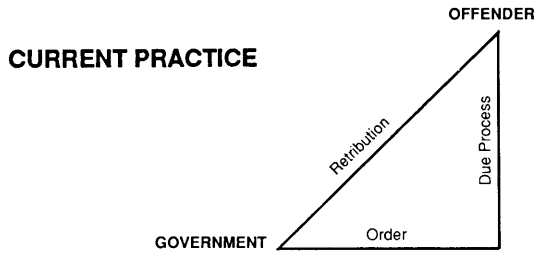
Restorative Justice

Justice Fellowship has begun a three-year project to develop a system model based on Restorative Justice principles. We began with the thesis that our criminal justice system is in crisis largely because its sole active party is government, and its sole focus is the offender. True justice requires a balanced approach involving victims, offenders, government and local communities.

Three principles form the foundation of Restorative Justice:

1. Crime results in injuries to victims, communities, and offenders; therefore, the criminal justice process must repair those injuries.
2. Not only government, but victims, offenders, and communities should be actively involved in the criminal justice process at the earliest point and to the maximum extent possible.
3. In promoting justice, the government is responsible for preserving order, and the community is responsible for establishing peace.

It may be helpful to demonstrate the differences between Restorative Justice and current practice. As noted before, contemporary criminal justice focuses exclusively on the offender and the government.

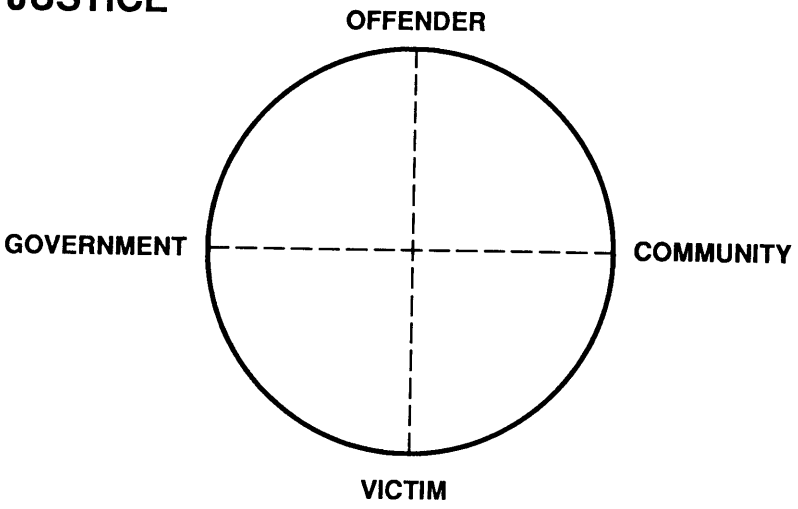


Government's function is to provide security for society by establishing order. Its interest is to punish those who violate the law. Offenders, on the other hand, assert their due process protections: the rights and liberties that have been established to ensure fair treatment of individuals.

The criminal justice system is essentially a contest to determine whether there will be retribution imposed on the offender, and if so, in what form. It pits government against individual in a high-stakes conflict.

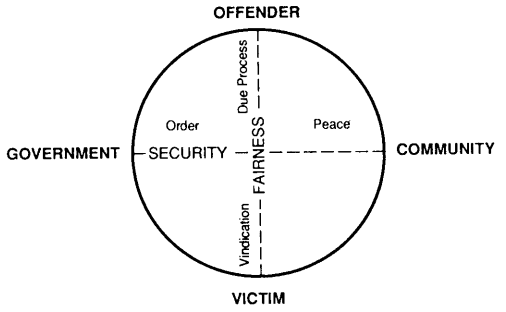
In contrast, Restorative Justice returns to the ancient view that there are actually four parties, rather than just two.

RESTORATIVE JUSTICE



When we expand the diagram to include the victim and community, we begin to appreciate just how truncated and unbalanced the prevailing view of justice has been.

RESTORATIVE JUSTICE

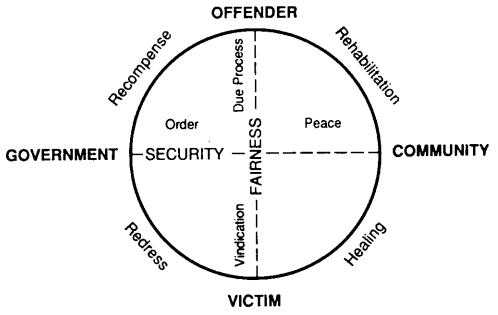


Fairness means more than due process for the offender. It also requires vindication of victims' claims. This not only includes exoneration from responsibility for the injuries done to them, but also reparation — giving victims what is due them.

Security is not obtained through governmentally-imposed order alone. The community also contributes by forming strong, stable, peaceful relationships among its members.

Finally, we have a more comprehensive set of goals.

RESTORATIVE JUSTICE



In Restorative Justice, the purpose of the government's interaction with the offender is probably better termed recompense than retribution. Retribution is "deserved punishment for evil done". While that underscores an important aspect of the government-offender relationship it has two shortcomings. First, the only active party is the government, the punisher; the offender is merely a passive recipient. Second, punishment that does not help repair the injuries caused by crime simply creates new injuries.

While Webster's uses recompense as a synonym for retribution, the two words are slightly different. Recompense is "something given or done to make up for an injury". It adds what retribution alone omits. First, the active party is the one who caused the injury. Second, the purpose of the sanction is to repair the injury caused by the crime.

Furthermore, recompense becomes only one of a series of societal goals. Rehabilitation of offenders, healing of victims, and victim compensation are also important aims. The model suggests that requiring recompense and offering redress are features of the government's interaction with offenders and victims, while offering rehabilitation and healing characterize the community's.

There is one final feature of the model. Its circular construction reflects the dynamic and dependent relationships that exist among the parties. Peace without order is as incomplete as due process without vindication. Healing without redress would be as inadequate as rehabilitation without recompense.

This has several implications. First, we cannot pick and choose the features we like and abandon the others; they are all essential. But that is exactly what we have done in our current approach to criminal justice. The system focuses exclusively on the relationship between the offender and government. It is why we need a new approach — the vision of Restorative Justice — to responding to crime.

Second, our strategies to prevent and respond to crime must involve all the parties as fully as possible. Prevention requires a cooperative effort between the community and the government. It is not simply government's responsibility. Order and peace are both necessary to provide for security and to prevent crime.

When crime does take place, the interaction becomes even more dynamic. Both government and community must now respond to the victim and the offender. This creates, in effect, parallel tracks for responding to the crime, one administered by the government and the other by the community.

The governmental track is the criminal justice system. It provides a formal procedure for declaring certain acts as criminal, detecting and apprehending suspects, determining guilt or innocence, determining appropriate sanctions, and vindicating and securing reparation for victims.

The community-based track is more organic than formal. It is also less developed in the United States, although other countries, such as Japan, appear to have a more evenly-balanced two-track approach (Haley, 1988). Whereas government seeks an orderly resolution, the community involvement is focused on restoring peace: rehabilitation of the offender, healing of the victim, and reconciliation of both.

The two tracks should be explicitly linked at appropriate stages. For example, community-based Victim-Offender Reconciliation Programs (part of the informal track) intervene at specific stages of the formal criminal justice system. The results of the mediation are subsequently presented at the sentencing hearing and given formal approval.

Since society's overarching response to crime should be to repair injuries, crime should be dealt with through the informal process as much as possible.

From Vision to Reality

How, then, do we make the vision of Restorative Justice a reality?

I have two suggestions. The first is really a caution: we must distinguish between the vision itself and the strategies for accomplishing the vision. Strategic reforms are not the vision: they bring us closer to a total societal response to crime which reflects the vision. A physician conducts surgery not because that is the essence of health, but because it can lead to health.

Second, we should choose reforms which will facilitate the dynamic and dependent relationships which characterize Restorative Justice. This means that by themselves the reforms may appear just as unbalanced as the system they are to remedy. But because they address missing aspects of justice, the result will be restored balance.

For example, contemporary criminal justice systems lie firmly in the upper left quadrant of the Restorative Justice model. If we want to redress this imbalance, then we should look closely at the lower right quadrant for possible reforms.

This suggests that we should consider strategies that expand the roles of the victim and of the community, with the victim's role receiving the greatest emphasis. While communities do need to become more active in responding to crime, they have had a long history of participation, ranging from John Augustus' voluntary sponsorship of convicted offenders, to contemporary crime watch programs. The victim, on the other hand, is the party most neglected by the criminal justice system.

What might such reforms look like? Here are four which Justice Fellowship has adopted as "key impact goals" — reforms that would address the needs of victims in relation to the other three parties:

1. To grant victims a formal role in the criminal justice system, including the right to participate (with legal representation) in criminal cases to pursue restitution.

2. To sentence nondangerous offenders to restitution and community service programs rather than prison.

3. To provide victims of crime with first response and crisis intervention services through local churches.

4. To provide victims and offenders in every community with opportunities for reconciliation through church-based programs.

Each of these goals would require a radically different response to the needs of victims by the other parties.

1. To grant victims a formal role in the criminal justice system, including the right to participate (with legal representation) in criminal cases to pursue restitution.

While this would be a complete departure from United States criminal justice practice, several western European countries allow victims to join civil claims for damages with criminal trials (Dunkel, 1986). French victims may even initiate criminal proceedings themselves if the public prosecutor has decided not to pursue the case (Merryman and Clark, 1978).

The trial of the terrorist Mohammed Hammadi is a case in point. As of this writing, Hammadi is on trial in West Germany for participating in the 1985 hijacking of a TWA flight, and for the murder of U.S. Navy diver Robert Stethem. Stethem's parents are participating in the trial as co-plaintiffs with the government, represented by their own West German lawyer. Had this trial taken place in the U.S., the Stethems would have had no role at all.

There are at least three advantages to allowing victims this right. First, the criminal process would be more speedy and less costly than the civil process (Schlesinger, 1980, p. 457; Merryman and Clark, 1978, p. 734). Second, it would affirm the principle that crime is an offense principally against the victim, not the government. And third, it would distinguish the legal interest of the victim from that of the government.

2. To sentence nondangerous offenders to restitution and community service programs rather than prison.

Three factors should be considered in sentencing decisions: the seriousness of the offense, the risk the offender poses, and the injury caused by the offense. The extent of injury should determine the amount of restitution or community service ordered. The risk the offender poses should determine the degree of control to be exerted by the government. And the seriousness of the offense will ordinarily determine the length of the sanction.

As a practical matter, imprisonment makes restitution an impossibility. Few prisoners have either the external resources or the prison-labor income to repay their victims. Therefore, prison should not be used for those who do not constitute a serious risk to the community, since they can be adequately supervised in other settings which permit them to work and perform community service.

This approach would not only work to the advantage of victims; it would also save the community the tax burden of unnecessary incarceration, and would help the government address the prison crowding crisis. It would also keep nondangerous offenders out of debilitating prison conditions.

To be a successful strategy, objective criteria would need to be established to identify those deemed "dangerous". However, even using something as wooden as "violent/nonviolent" reveals that a substantial portion of those in prison might be sentenced differently

under this proposal. Nearly 35% of state prisoners in 1986 were convicted of nonviolent crimes, and had no previous record of violent crime (Innes, 1988).

3. To provide victims of crime with first response and crisis intervention services through local churches.

Victims need assistance from the moment a crime is committed. The immediate and long term impact of crime can be devastating. But the extent of long term injuries can be reduced if immediate aid is available. First response and crisis intervention programs provide services such as emergency shelter, financial assistance, crisis intervention, child care, and referrals to social service agencies.

While there are already successful programs throughout the country, most are unable to provide the comprehensive help that is needed, due to staff and funding shortages. Communities must augment existing system-based victim assistance programs, and help publicize their existence.

Justice Fellowship has targeted local churches because of our unique constituency. We work with Christians for reforms that are consistent with biblical teaching, and we are affiliated with Prison Fellowship Ministries, which assists local churches in ministry to prisoners, ex-prisoners, and their families.

4. To provide victims and offenders in every community with opportunities for reconciliation through church-based programs.

We must address the need many victims have to meet with their offender, to ask questions, and sometimes even to reconcile with and forgive their offenders. This cannot, and should not, be forced on victims. But the healing potential is enormous for those who take the opportunity. Victim-Offender Reconciliation Programs (VORPs) allow victims and offenders to meet with trained mediators to discuss their feelings about the crime and to work out a restitution agreement.

This is good for victims. Not only do they receive restitution, but they also have a much higher degree of satisfaction with the justice process after such an encounter (McGillis, 1986). And the reconciliation process can also be beneficial to the offender (who typically would rather not meet with the victim). Through this process, offenders come to realize that their crime was more than something they did to "the system"; they violated another person.

Justice Fellowship's focus on church-based victim-offender reconciliation programs stems from the same organizational considerations mentioned in #3 above.

Conclusion

A child has laughed, and the emperor stands exposed. What should the onlookers do?

Some undoubtedly will discuss the need for stiffer penalties to deter potential con artists. Others will propose management courses to help the king make better personnel decisions. Still others will decry the sorry circumstances of the swindlers' upbringings.

All may have a point. But their response is incomplete unless someone gives the emperor what he really needs as he trudges home: a robe.

What I have proposed is that we respond to the need for robes; that we formally recognize that crime injures victims, and that the criminal justice process should help repair those injuries. We should do this not because it is the essence of justice, but because it will help restore balance.

Restorative Justice requires all four parties — victims, offenders, communities and government — to contribute to the reparation process. In fact, Restorative Justice unleashes the dynamic

inter-relationship of the interests, needs and goals of those parties. As such, it stands in stark contrast to our contemporary, two-dimensional criminal justice system, which considers only how much pain can be fairly inflicted on the offender for breaking the law.

But bringing the vision of Restorative Justice to reality demands a specific and achievable strategy. Meeting the needs of victims in four key areas should be that strategy. Doing so would help restore the balance now missing in society's response to crime.

References

Barnett, R. E. (1977). *Restitution: A New Paradigm of Criminal Justice.* In R. E. Barnett and J. Hagel (Eds.), **Assessing the Criminal: Restitution, Retribution, and the Legal Process** (pp. 349-383). Cambridge, MA: Ballinger.

Berman, H. (1983). **Law and Revolution: The Formation of the Western Legal Tradition.** Cambridge, MA: Harvard University.

Dunkel, F. (1986). *Reparation and Victim-Offender Conciliation and Aspects of the Legal Position of the Victim in Criminal Procedures in Western-European Perspective.* In **European and North-American Juvenile Justice Systems: Aspects and Tendencies** (pp. 303-327). Munich: Schriftenreihe der Deutschen Vereinigung fur Jugendgerichte und Jugendgerichtshilfen.

Haley, J. O. (1988). *Confession, Repentance and Absolution: The Leitmotif of Criminal Justice in Japan.* In M. Wright and B. Galaway (Eds.), **Mediation and Criminal Justice: Victims, Offenders, and Community.** London: SAGE Publications.

Innes, C. A. (January, 1988). **Profile of State Prison Inmates 1986.** Washington, DC: US Department of Justice, Bureau of Justice Statistics.

McGillis, D. (December, 1986). **Crime Victim Restitution: An Analysis of Approaches.** Washington, DC: US Department of Justice, National Institute of Justice, Office of Communication and Research Utilization.

Merryman, J. H., and Clark, D. S. (1978). **Comparative law: Western European and Latin American legal systems.** Indianapolis: Bobbs-Merrill.

Schlesinger, R. B. (1980). **Comparative Law: Cases, Texts, Materials.** Mineola, NY: Foundation Press.

Van Ness, D. W. (1986). **Crime and its Victims: What We Can Do.** Downers Grove, IL: InterVarsity Press.

Alternative Visions in the Context of Contemporary Realities

M. Kay Harris

My initial plan for this paper was to discuss dangers and dilemmas surrounding various types of efforts to effectuate change based on alternative models of justice while traditional criminal justice practices and ideology remain generally in force. However, when I received and read draft papers from two of the other panelists, I decided that the discussion could be a lot livelier and potentially more productive if I utilized those papers as a way of surfacing the issues I planned to address. In particular, I am going to take the liberty of commenting fairly extensively on Dan Van Ness' paper.* Luckily, I know that not only is Dan a good sport, but also that he is genuinely interested in feedback on his emerging vision. In addition, Dan knows that I am struggling with many of the same issues as I explore what a feminist vision of justice might look like and I hope that my reactions and questions will be helpful to all of us who are chasing similar dreams.

An article in the September-October 1988 issue of "Lifelines," the Newsletter of the National Coalition to Abolish the Death Penalty, drew parallels among the movements to abolish slavery, racial segregation, and the death penalty. The author, Professor Bruce Ledewitz, argued that the movement to abolish slavery can teach us things about tactics, timing, and leadership that can be applied in other change efforts. He noted, for example, that abolitionists never agreed on a statement of intermediate goals, never affirmed a common theory of abolitionism, and never resolved the sharp conflict between pushing for reform of existing conditions versus a militant demand for an immediate end to slavery. He cited as an illustration the sharp dispute between Lysander Spooner and Wendell Phillips. Spooner argued that, properly interpreted, the

*This is Harris' response to Van Ness' original paper. As published here, Van Ness' paper incorporates some revisions which probably would not alter Harris' overall focus but might have changed her emphases somewhat.

Constitution prohibited slavery and he called upon judges to declare the existing system unconstitutional. Phillips, on the other hand, berated Spooner's scholarship and reasoning, concluded that the Constitution was pro-slavery, and called upon judges to resign from office rather than enforce an immoral law. Ledewitz argued that debates like that helped make abolitionists an intellectual force to be reckoned with in American life, a status I fear those of us concerned with attacking injustices today do not enjoy. We sorely need to strengthen both our analyses and our proposals for change and it is in that spirit that I raise a number of major concerns from Dan's draft paper entitled "Pursuing a Restorative Vision of Justice."

First, the model as presented appears destined to fail at the stated aim of social repair or restoration since it is directed exclusively toward individual-level responses and does not encompass social-level remedies. Although it does not say so directly, the paper's focus on getting the offender to repair the damage caused by his or her offense makes it appear as if crime is solely or primarily an individual problem attributable to the weakness, sinfulness, or other deficiencies of individual lawbreakers. It does not address the role of society, of structural and institutional forces that promote crime and conflict.

The exclusive emphasis on the individual responsibility of the offender appears likely to reinforce current social divisions and inequities. Consider, for example, the significance of the fact that the population presently under control of the penal system is so disproportionately male, minority, and poor. Are we to simply accept this social fact as a reflection of the failings of these individuals, disregarding the economic, political, and social forces at play? It is not necessary to reject altogether the notions of free will and individual responsibility to recognize that the state, the community, the family, and many other institutions and forces have a great deal to do with crime in our society. I find it alarming to discuss paradigms relating to justice concerns without addressing how what is being proposed takes into account past and ongoing injustices and contributes toward their redress and elimination. Thus the model is

an unsatisfactory one for me in that it is not clearly rooted in a commitment to more fundamental social change.

In light of the next major concern raised below, I think it is important to ask here whether this first fundamental criticism, that the model fails by focusing on individual-level responses to the exclusion of social-level remedies, suggests disagreement with the interest expressed in "personalizing" responses to crime. Many of us have been influenced by Christie's observations about conflicts as property and share the view that the current system often leaves victims feeling that "Somebody stole my conflict." (Christie, 1977) That somebody, of course, is the state and its official representatives who move in, take over, and impose roles, definitions, and interests on those who had harbored the quaint notion that they were centrally involved.

I do not think that a commitment to giving more voice and power to those most directly involved in a given incident requires abandoning responses other than those focused solely on what the people involved can do personally in the present or the short-range future. Indeed, those involved may want to tailor their responses in light of forces that they think may have contributed to the offensive behavior or that make the person's acts less blameworthy. Furthermore, I think that the very idea of a restorative model reflects a deep interest not only in repairing harm done in the past, but also in striving toward a better future, a future in which people are living "in right relationship" with one another materially, socially, and spiritually, as Howard Zehr puts it in his paper. That future emphasis requires a commitment to making serious inquiry into the factors that contribute to crime, conflict, and injustice and to acting to alleviate or eliminate them.

Another major concern that Dan's paper raises in my mind relates to the reliance it places on the government, the established criminal justice system, and its official agents. Indeed, Dan's proposals seem to envision simply adding or inserting new parties and procedures into the existing adversarial process. I am not at all sure that

granting victims a formal role in the criminal justice system, including the right to participate in all phases of criminal case processing and the right to be represented by their own attorneys, would, as Dan suggests, affirm the principle that crime is an offense principally against the victim rather than the state. Rather, it would seem to give even greater weight and power to both the state and the legal profession, resulting in responses that are even farther removed from the people most directly involved than now is true. Thus, I question the idea that the best way to try to empower victims is to give them lawyers and try to insert them into the formal legal process, and I am even more skeptical that such a process would help advance reconciliatory interests.

Dan emphasizes the concepts of equilibrium and balance, suggesting that to restore balance we need for a time to give far greater emphasis to the players who have received too little consideration to date, i.e., the victim and the community. But I'm afraid that his proposals would yield a far worse imbalance than now exists, with the offender finding himself or herself not only lined up in defense against the state, but also against the victim and perhaps (the proposal is not fully clear in this regard) some new entity or presence put there to represent "the community." It seems to me that if balance is of concern and if victims are to be granted a more significant role in deciding how best to respond to crime, their greater power should be gained through at least a corresponding reduction in the power and involvement of the state. Simply injecting into the status quo some kind of formal victim- offender confrontation, replete with lawyers on both sides, and providing for the victim to have a formal say in each step of the traditional process promises only to do more to further unbalance an already skewed system.

Dan's paper does not make it very clear how he envisions "communities" being actively involved in the process. It is all well and good to assert that crime harms the community as well as the direct victim, but achieving meaningful community participation in repairing the wounds requires more than adding the word

"community" to a diagram portraying who is involved. If general experience to date with "community corrections" and "community policing" offers us any lessons, a clear imperative would be to specify more carefully what we mean by "community" or "communities" and how and why it or they would be involved. The examples Dan gives of John Augustus' voluntary sponsorship of offenders and crime watch programs suggest to me that laying out ways to operationalize the admirable notion of eliciting more active community involvement in the reconciliation process remains an elusive task.

A major concern that Dan's paper raises relates to the impact of the proposals on those who come into the process with the identity or designation of "offenders." I fear that this way of framing a reconciliation model would work against helping to empower offenders, who would find themselves facing and having to try to satisfy an even more numerous and powerful set of adversaries. Indeed, it is my sense from the paper that Dan might have trouble accepting the idea of offender empowerment as a legitimate aim of a reconciliation model. As Howard says in his paper, however, "To be whole, people also need to feel like they are in control of their own lives. Denied personal power, individuals feel less than human." Although Howard is referring to victims in that passage, these realities apply equally to offenders who, after all, are human too.

Current criminal justice practices tend to reinforce common feelings of powerless on the part of offenders. The system does things to them and does not hesitate to use them as means to an end. I think that a restorative model must be willing to treat offenders as persons and to support to the fullest extent possible their efforts to achieve self-determination. Along these lines, I was not very satisfied by Dan's assurance that some offenders might benefit from the reconciliation process through coming to realize by meeting with the victim "that their crime was more than something they did to 'the system'; they hurt another person." That strikes me as a very paternalistic way of construing how the model might prove beneficial to offenders.

Does Dan's model envision other potential advantages to offenders over current practice besides a potential for increased insight? It appears that the offender is to continue to get his or her dose of fairness, in the form of due process, although it is not clear that the proposal would offer anything to enhance the fairness of the process beyond what already may exist. The model also suggests that the community is supposed to embrace rehabilitation of offenders as one of its aims, but the paper does not spell out what this change would mean nor address the philosophical and practical issues surrounding it. Thus, it seems to me that the major advantage implied for offenders is the possibility of receiving a less harsh sentence and avoiding "potentially-debilitating prison conditions" under "the restitution principle."

I believe it might well be true that if victims had more of a say in dispositional decisions, many would be less harsh than government agents left to their own devices. I also agree that if first priority were truly to be given to restitution or restorative interests, then many penalties would be less harsh than is currently the case because many current penalties interfere with restitution efforts. I fear, however, that these possibilities are undermined by retaining an adversarial process with an increased number of participants being given a say as to what should be done to the offender.

I fear that these possibilities are also weakened by throwing in the "incapacitation principle." Dan offers the "incapacitation principle" as a competing principle to the "restitution principle", saying that "when there are identifiable risks of future criminal behavior, the government should take necessary steps to limit the freedom of the offender and protect the public." He also states that when the offender poses such a risk that imprisonment is required, a sentence should be imposed that "prohibits restitution." I am afraid that this represents a fundamental unwillingness to break away from the existing paradigm. It is like announcing that you support peace and disarmament and will try to negotiate with other nations toward those ends, but not with those countries that you regard as dangerous.

I have an idea that identifying the role and centrality of our old nemesis "the dangerous offender" in proposals for paradigmatic change may serve as a good indicator of how near or far from current practice the proposals will turn out to be. I know that none of us, including me, have come up with a paradigm that offers a convincing alternative to all coercive restraint, but I fear that we back off far too quickly from trying to confront the reality of the "dangerous offender" boogey man. I certainly don't like the way that we seem to be willing to essentially write off an entire group of people and I also fear that making the concession that "of course, we don't mean to include dangerous offenders," gets us back awfully close to current practice.

The positions that nondangerous offenders should not be incarcerated and that restitution should be required in all non-incarcerative sentences have been widely advocated for years. The one thing that may be different about Dan's formulation is his advocacy of making vindication/recompense a primary aim, second in priority only to incapacitative interests. However, by ranking the restitution principle second and by suggesting that it may be "modified by other purposes as appropriate," I fear that what is left looks less and less like a basis for developing a new paradigm and more and more like what others have called "selective incapacitation" models.

I very much appreciate the title Howard Zehr gave to his paper for this panel, "Justice: Stumbling Toward a Restorative Ideal." I think he is quite right to suggest that restorative justice is hardly a paradigm at this point. Indeed, I think we are not very close to having even the skeleton or the outlines of a new paradigm. It seems to be awfully difficult to escape the fetters of current ways of thinking. Perhaps even more troubling are the serious risks Howard mentions of "ignoring value questions and of tacking new experiments, even (or especially) reparative ones, on to the existing criminal justice system."

The process of drawing out some of the concerns that Dan's proposals raise in my mind has pushed me to try to get more explicit in setting out the values or ethical standards against which I gauge proposals for change. This is not a process that flows easily for me; often I find that while I have a clear "sense" about an issue, it is nonetheless extremely difficult to articulate and justify my position. I also recognize that not everyone necessarily will subscribe to precisely the same ethical standards. However, it seems to me that in trying to get farther in laying out our ethical standards we can get a clearer sense of where values are shared and of where we disagree.

Some Ethical Guides

In a 1987 Ms. magazine article, Gloria Steinem offered five suggestions as guidelines for the ethics of the future that seem to apply well to the issues and concerns raised above.

I. Whatever means you use will become part of the ends you achieve. Just as Oliver North and others involved in the Iran/Contra affair should have questioned whether democracy could be protected by using such undemocratic means or whether they might not bring the country closer to the authoritarian secrecy that the war was supposed to be fighting against, Steinem stresses the historical dangers of authoritarian arguments that the end justifies the means and absolutist arguments that there is only one moral means to each moral end. We should continually challenge claims that security or justice require us to employ imprisonment, coercion, repression, and other means that we regard as inhumane, counterproductive, or otherwise inconsistent with our aspirations.

II. No ethical decision is exactly transferable from one situation to the next. While recognizing that laws have precedents and that the spirit of a law is transferable, Steinem challenges arguments like that advanced by Robert Bork that the U. S. Constitution should not be

held to guarantee rights (such as a right to privacy) unless they are explicitly stated within it. Ethical decisions require giving consideration to social and historical context as well as to the immediate personal context in which they are being made. Thus, as society evolves toward a higher level of civilization, it is reasonable to expect that earlier decisions finding morally questionable actions acceptable, whether they involve crowding prisoners into tiny cells designed for one person or utilizing the death penalty, will come to be seen not only as morally wrong but as constitutionally prohibited. It is important, therefore, that we consider the actual effects of actions and decisions on people in terms of how they square with our values and aims and not simply look to case law or other authority for guidance.

III. The people with the most ethical right and responsibility to make a decision are the people who will be affected by it. This guideline is consistent with the thrust of restorative models, suggesting that people who have experienced something may be more expert in it than the experts and that the people most effected should have the greatest say because they have the strongest stake in the outcome. It can serve to restrain us from acting on the basis of what we think will benefit others without involving or consulting them. This principle also suggests the need to limit the role of government and of the official criminal justice system and its agents. As Christie has put it, we need to work toward "so little state as we dare." (Christie, 1981) If we are serious about striving to return as much responsibility as possible for reparative action and conflict resolution to the people most directly involved, we also must be serious about letting those people exercise power. The effective exercise of power is central to the process of change. Power is not given, it is exercised. Efforts to support and strengthen the capacities of those presently denied the resources, rights, and recognition to exercise power need to apply not only to victims, but to offenders as well.

IV. There is a human and humane principle of simple fairness. This guideline reminds us that fundamental fairness may require something more than equal treatment. Compensatory or affirmative action or other special consideration may be required to make up for historical unfairness. As Steinem points out, there is considerable evidence that the overwhelming majority of Americans are willing to sacrifice for the good of the community, or the environment, or the country, but only if they feel that the necessary sacrifice is being spread equally in the long term. What breeds resentment is the long-term unrelieved sense that our acts are not being rewarded or punished in the same way as the acts of those around us. Even if some past injustices never can be compensated for adequately, it can restore a sense of fairness to feel that everyone is trying.

V. Do unto others as you would have others do unto you. As Steinem says, "Empathy is still the most democratic and therefore revolutionary of emotions...It turns healthy self-interest into equally healthy altruism — and vice versa." This guideline is perhaps most put to the test when we are confronted with people who have acted in ways that we can not imagine ourselves acting and that evident disrespect for the personhood and interests of those against whom they have offended. It stands unqualified as a guideline, however, suggesting that it may be most relevant when it seems most difficult to follow.

References

Christie, Nils. (1977). *Conflicts as Property.* **British Journal of Criminology,** Vol. 17, pp. 1-19.

Christie, Nils. (1981). **Limits to Pain.** Oslo, Universitetsforlaget.

Gloria Steinem. *If Moral Decay is the Question, Is a Feminist Ethic the Answer?* **Ms,** September 1987.

Issues of the Occasional Papers

Christie, Nils. *Crime, Pain and Death.* Issue No. 1.

Bianchi, Herman. *A Biblical Vision of Justice.* Issue No. 2.

Klaassen, Walter. *Peoplehood and the Law.* Issue No. 3.

Zehr, Howard. *Retributive Justice, Restorative Justice.* Issue No. 4.

Lind, Millard. *Transformation of Justice: From Moses to Jesus.* Issue No. 5.

Pendleton, John. *More Justice, Less Law.* Issue No. 6.

Harris, M. Kay; Van Ness, Dan; Zehr, Howard. *Justice: The Restorative Vision.* Issue No. 7.