

Transformative Justice

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Transformative justice is a general philosophical strategy for responding to conflicts. It takes the principles and practices of restorative justice beyond the criminal justice system. It applies to areas such as environmental law, corporate law, labor-management relations, consumer bankruptcy and debt, and family law. Transformative justice uses a systems approach, seeking to see problems, as not only the beginning of the crime but also the causes of crime, and tries to treat an offense as a transformative relational and educational opportunity for victims, offenders and all other members of the affected community. In theory, a transformative justice model can apply even between peoples with no prior contact.

It can be seen as a general philosophical strategy for responding to conflicts akin to peacemaking. Transformative justice is concerned with root causes and comprehensive outcomes. It is akin to healing justice more than other alternatives to imprisonment.

In contrast to restorative justice, no quantification or assessment of loss or harms or any assignment of the role of victim is made, and no attempt to compare the past (historical) and future (normative or predicted) conditions is made either. The victim is not normally part of the transformative process, but can choose to be. Participants agree only on what constitutes effective harms reduction, which may include separating or isolating perpetrator and victim.

In contrast to equity-restorative justice, there is no social definition of equity imposed on participants. Each is free to decide on some "new normal" state of being for themselves, and is not pressured to agree on it. A victim may continue to seek revenge or desire punishment, e.g. as in retributive justice systems. A perpetrator may lack remorse and may say that they lack remorse.

As in transformative learning, one works from desired future states back to the present steps required to reach them. The issue is not whether the perpetrator may make a choice to do something similar again, but whether the community is willing to support the victim and perpetrator in some form of contact. It is possible for the community to choose to support the perpetrator and not the victim as defined by the law, but if they do so they may be obligated to support some re-definition of "equity" so that law comes back into line with the social concept of equity. For example, it is possible for the community to support imprisonment as a means of isolation but not punishment.

This model may have roots in the work of Samuel Tuke and B. F. Skinner but departs by relying on individual volunteers' caring and supporting capacity, not any socially imposed etiquette derived from civilization. Transformative justice theory has been advanced by Ruth Morris and Giselle Dias of the Canadian Quakers.

Restorative justice (also sometimes called "reparative justice") is an approach to justice that focuses on the needs of victims, offenders, as well as the involved community, instead of satisfying abstract legal principles or punishing the offender. Victims take an active role in the process, while

offenders are encouraged to take responsibility for their actions, "to repair the harm they've done--by apologizing, returning stolen money, or community service". Restorative justice takes crime seriously without increasing repression and exclusion involving both parties and focusing in on their personal needs. In addition, it provides help for the offender in order to avoid future offences. It is based on a theory of justice that considers crime and wrongdoing to be an offense against an individual or community rather than the state. Restorative justice that fosters dialogue between victim and offender shows the highest rates of victim satisfaction and offender accountability. According to Zehr and Mika (1998), there are three key ideas that support restorative justice. First, is the understanding that the victim and the surrounding community have both been affected by the action of the offender and in addition, restoration is necessary. Second, the offender's obligation is to make amends with both the victim and the involved community. Third, and the most important process of restorative justice is the concept of 'healing.' This step comes in two different parts: the healing for the victim, as well as meeting the offender's personal needs. Both parties are equally important in this healing process to avoid recidivism and to instill safety back into the victim's life. There are various methods of restorative justice practiced, some examples are victim offender mediation, conferencing, healing circles, victim assistance, ex-offender assistance, restitution, and community service. Each method focuses in on the needs of both the offender and the victim and heals in different ways. Restorative justice principles are characterized by four key values: first, the encounter of both parties. This step involves the offender, the victim, the community and any other party who was involved in the initial crime. Second, the amending process takes place. In this step, the offenders will take the steps necessary to help repair the harm they have caused. Third, reintegration begins. In this phase, restoration of both the victim and the offender takes place. In addition, this step also involves the community and others who were involved in the initial crime. Finally, the inclusion stage provides the open opportunity for both parties to participate in finding a resolution. The process of restorative justice is lengthy and must be committed to by both parties for effective results.

Restorative justice is defined as:

... a broad term which encompasses a growing social movement to institutionalize peaceful approaches to harm, problem-solving and violations of legal and human rights. These range from international peacemaking tribunals such as the South Africa Truth and Reconciliation Commission to innovations within the criminal and juvenile justice systems, schools, social services and communities. Rather than privileging the law, professionals and the state, restorative resolutions engage those who are harmed, wrongdoers and their affected communities in search of solutions that promote repair, reconciliation and the rebuilding of relationships. Restorative justice seeks to build partnerships to reestablish mutual responsibility for constructive responses to wrongdoing within our communities. Restorative approaches seek a balanced approach to the needs of the victim, wrongdoer and community through processes that preserve the safety and dignity of all".

Restorative justice is very different from either the adversarial legal process or that of civil litigation. Court-annexed ADR (alternative dispute resolution) and restorative justice could not be philosophically further apart", because the former seeks to address only legally relevant issues and to protect both parties' rights, whereas restorative justice seeks "expanding the issues beyond those that are legally relevant, especially into underlying relationships."

Similarly, citing Greif, Liebmann wrote

" a way of looking at restorative justice is to think of it as a balance among a number of different tensions:

a balance between the therapeutic and the retributive models of justice

a balance between the rights of offenders and the needs of victims

a balance between the need to rehabilitate offenders and the duty to protect the public."

Traditional criminal justice seeks answers to three questions: what laws have been broken? who did it? and what do the offender(s) deserve? Restorative justice instead asks: who has been harmed? what are their needs? whose obligations are these?

History

Restorative approaches to crime date back thousands of years:

In North America, justice in First Nations and Native American communities have had aspects of restorative justice.

In Israel, the Pentateuch specified restitution for property crimes.

In Sumer, the Code of Ur-Nammu (c. 2060 BC) required restitution for violent offenses.

In Babylon, the Code of Hammurabi (c. 1700 BC) prescribed restitution for property offenses.

In Rome, the Twelve Tables (449 BC) compelled convicted thieves to pay double the value of stolen goods.

In Ireland, under the Brehon Laws (first recorded in the Old Irish period) compensation was the mode of justice for most crimes.

In Germany, tribal laws promulgated by King Clovis I (496 AD) called for restitutive sanctions for both violent and nonviolent offenses.

In England, the Laws of Ethelbert of Kent (c. 600 AD) included detailed restitution schedules.

In New Zealand/Aotearoa, prior to European contact, the Maori had a well-developed system that protected individuals, social stability and the integrity of the group.

Retributive justice began to replace such systems following the Norman invasion of Britain in 1066 A.D. William the Conqueror's son, Henry I, detailed offenses against the "king's peace." By the end of the 11th century, crime was no longer perceived as injurious to persons, but rather was seen as

an offense against the state.

Application

In criminal cases, victims can testify about the crime's impact upon their lives, receive answers to questions about the incident, and participate in holding the offender accountable. Offenders can tell their story of why the crime occurred and how it has affected their lives. They are given an opportunity to directly compensate the victim--to the degree possible. In criminal cases, this can include money, community service in general and/or specific to the offense, education to prevent recidivism, and/or expression of remorse.

In social justice cases, impoverished victims such as foster children are given the opportunity to describe their future hopes and make concrete plans to transition out of state custody in a group process with their supporters. In social justice cases, restorative justice is used for problem solving.

Restorative justice can proceed in a courtroom or within a community or nonprofit organization.

A courtroom process might employ pretrial diversion, dismissing charges after restitution. In more serious cases, a prison sentence may precede other restitution.

In the community, concerned individuals meet with all parties to assess the experience and impact of the crime. Offenders listen to victims' experiences, preferably until they are able to empathize with the experience. Then they speak to their own experience: how they decided to commit the offense. A plan is made for prevention of future occurrences, and for the offender to address the damage to the injured parties. All agree. Community members hold the offender(s) accountable for adherence to the plan.

While restorative justice typically involves an encounter between the offender and the victim, some organizations, such as the Mennonite Central Committee Canada, emphasize a program's values over its participants. This can include programs that only serve victims (or offenders for that matter), but that have a restorative framework. Indigenous groups are using the restorative justice process to try to create more community support for victims and offenders, particularly the young people. For example, different programs are underway at Kahnawake, a Mohawk reserve in Canada, and at the Pine Ridge Indian Reservation of the Oglala Lakota nation, within the United States.

Processes

Victim-offender mediation

Victim-offender mediation, (VOM, also called victim-offender dialogue, victim-offender

conferencing, victim-offender reconciliation, or restorative justice dialogue), is usually a meeting, in the presence of a trained mediator, between victim and offender. This system generally involves few participants, and often is the only option available to incarcerated offenders. VOM originated in Canada as part of an alternative court sanction in a 1974 Kitchener, Ontario case involving two accused vandals who met face-to-face with their many victims.

Family group conferencing

Family group conferencing (FGC) has a wider circle of participants than VOM, adding people connected to the primary parties, such as family, friends and professionals. FGC is often the most appropriate system for juvenile cases, due to the important role of the family in a juvenile offender's life. Examples can be found in New South Wales (Australia) under the 1997 Young Offenders Act, and in New Zealand under the 1989 Children, Young Persons, and their Families Act. The New South Wales scheme has been favorably evaluated by the New South Wales Bureau of Crime Statistics and Research.

Restorative conferencing

Restorative conferencing (RC) also involves a wider circle of participants than VOM. Restorative conferences, which have also been called restorative justice conferences, family group conferences and community accountability conferences, originated as a response to juvenile crime.

An RC is a voluntary, structured meeting between offenders, victims and both parties' family and friends, in which they address consequences and restitution. RC is explicitly victim-sensitive.

The conference facilitator arranges the meeting. In some cases, a written statement or a surrogate replaces an unwilling victim. The conference facilitator sticks to a simple script and keeps the conference focused, but intentionally does not testify. The intent is to allow subsequent conferences to succeed without a facilitator.

In Brazil the juvenile justice system and schools have begun to use an RC style inspired by Nonviolent Communication. The approach strives to redefine the participants as human beings, rather than labeling them as "offender", "victim", etc., and to focus on each person's choices and the human needs that motivated them. Each participant is encouraged to take responsibility for his or her actions and collaboratively create the outcome. RC was successfully introduced in several schools in England, including St. Augustine of Canterbury (2004-2008) Taunton, Somerset. Positive results led officials to offer training to all Somerset secondary schools.

Community restorative boards

A community restorative board, also referred to as Community Justice Committees in Canada and Referral Order Panels in England & Wales, is typically composed of a small group, prepared by intensive training, who conduct public, face-to-face meetings. Judges may sentence offenders to participate; police may refer them before charging them; or they may engage outside the legal system.

Victims meet with the board and offender, or submit a written statement which is shared with the offender and the board. Board members discuss the nature and impact of the offense with the offender. The discussion continues until they agree on a deadline and specific actions for the offender to take. Subsequently, the offender documents progress in fulfilling the agreement. After the deadline passes, the board submits a compliance report to the court or police, ending the board's involvement.

Restorative circles

In Hawaii, Restorative Circles allow prisoners to meet with their families and friends in a group process to support their transition back into the community. Meetings specifically address the need for reconciliation with victims of their crime(s). A Modified Restorative Circle was developed and used in Hawaii for offenders whose loved ones are unable or unwilling to participate. Other prisoners sit in the Circle and help develop the transition plan.

Circles of support and accountability

Circles of Support and Accountability (CoSA) originated as a project of the Welcome In", a Mennonite church in Hamilton, Ontario. This approach has demonstrated the capacity to enhance the safe integration of otherwise high-risk sex offenders with their community. Canada judges some sex offenders too dangerous for any form of conditional release, "detaining" them until they serve their entire sentence. A subsequent conviction often leads to designation as a "Dangerous Offender".

Prior to 1994 many such offenders were released without any support or observation beyond police surveillance. Between 1994 and 2007, CoSA assisted with the integration of well over 120 such offenders. Research indicated that surrounding a 'core member' with 5-7 trained volunteer circle members reduced recidivism by nearly 80%. Further, recidivist offences were less invasive and less brutal than without the program. CoSA projects now exist in every Canadian province and every major urban centre. CoSA projects are also operational in several U.S. states (Iowa, California, Minnesota, Oregon, Ohio, Colorado, Vermont) as well as in several United Kingdom regions (Cornwall, Devon, Hampshire, Thames Valley, Leicestershire, North Wales, North Yorkshire, and Manchester).

Sentencing circles

Sentencing circles (sometimes called peacemaking circles) use traditional circle ritual and structure to involve all interested parties. Sentencing circles typically employ a procedure that includes: (1) application by the offender; (2) a healing circle for the victim; (3) a healing circle for the offender; (4) a sentencing circle; and (5) follow-up circles to monitor progress.

Implementing restorative justice

Brian Royce developed an approach he called "Operationalized Restorative Justice" for a contracted private prison for the state of Pennsylvania in the United States. The system was adopted and used in numerous contracted prisons around the country. The system was shown to significantly reduce recidivism and internal conflicts within the prisons.

The two primary uses within an institution are to manage behavior overall and to respond to specific criminal actions and behavior. Using restorative justice as an overall BMT is significantly more effective over the long term. It can be difficult to implement, as such wide changes to the culture of an institution are usually met with resistance from both the staff and the institution population.

Predominately restorative justice is used for the victim, specifically with a kind of mediation and/or restitution from the offender. Restorative justice is based on bringing together the victim, the offender, and the community; all have equal parts in repairing the relationships destroyed by crime. Generally the offender is held accountable to the victim for the criminal action and accountable as well to the community. The underlying premise of restorative justice holds that all three are accountable to each other.

The offender must be held accountable, the offender must give back in the way prescribed by the victim to make amends. Additionally the offender must also give back to the community, as crime devalues any community. The community is accountable to the victim by assisting in enforcing any reparations agreed upon by the victim, and to the offender by helping the person avoid committing any more crime. In some cases, it may be difficult for the victim to participate in meetings directly, but the system is based on the offender being brought to face the implications of the crime.

To implement the system within an institution, considerable ground work is needed. First, the institution has to establish what the norms are - what really goes on within the institution, evaluate whether they are acceptable to the whole community, and work from there. Ideally, the institution will define and establish positive norms which each person understands. For example, Albert Elias wrote about the norms of Respect, Responsibility, Confrontation, Help, Trust and Support. He gave concrete definitions for these norms, and held the inmates in their care to these norms, establishing what was called normative behavior. It is likely better for an institution to decide its norms through a process.

The second aspect is to ensure that the rules support the norm and are consistent with it, to make the rules enforceable. When there are clear norms/rules for what is acceptable and unacceptable behavior, the community can be held accountable to live by these. This can be done numerous ways, depending on the size of the institution, the physical layout, the type, the counseling programs, and the staffing. Here is where the separation between a response to criminal behavior within the institution and the overall behavior management tool becomes apparent. When used as a response to criminal behavior, the sequence of events is:

Crime takes place;

A circle (defined below) is called, composed of the victim, offender, and people within the community; and

The circle discusses what happened, and develops and executes some sort of reparation.

A circle is one of the most commonly used Restorative Justice practices, usually comprising the offender and the community and, if applicable, the victim. The offender must acknowledge the crime, the community discusses the implications, and, if applicable, the victim discusses the ramifications and the personal "cost". The circle must come to agreement on an acceptable restoration. The offender has to restore the cost, or provide a kind of compensation. The circle has regular meetings to discuss the progress, address any issues, and ultimately attempt to restore justice.

When used as an overall behavior management tool, Restorative Justice embraces cognitive behavioral techniques (CBT) through counseling and therapy. It is based on a person's taking positive actions and being able to see oneself positively. By feeling good about being positive, the person is more likely to maintain the positive behavior. CBT can contribute to the success of restorative justice. Restorative justice and CBT are being used together in alternative counseling, specifically targeted at sex offenders, juvenile offenders, extremely violent offenders, drug counseling, family counseling, etc.

Limitations on restitution

Some judicial systems only recognize monetary restitution agreements. For instance, if victim and offender agree that the offender would pay \$100 and mow the victim's lawn five times, the court would only recognize the \$100 as restitution. Some agreements specify a larger monetary amount (e.g. \$200) to be paid if the non-monetary restitution is not completed.

Many jurisdictions cap the amount which a juvenile offender can be required to pay. Labor regulations typically limit the personal service tasks that can be performed by minors. In addition, personal service usually must be approved by the juvenile's parents.

According to the Victim Offender Mediation Association, victims are not allowed to profit from

restitution (the equivalent of punitive damages; only out-of-pocket losses (actual damages) can be recovered. Courts can disallow unreasonable compensation arrangements.

Poor facilitator training is a common cause of poorly designed agreements.

Confidentiality

Some restorative justice systems, especially victim-offender mediation and family group conferencing, require participants to sign a confidentiality agreement. These agreements usually state that conference discussions will not be disclosed to nonparticipants. The rationale for confidentiality is that it promotes open and honest communication.

Recidivism

Reduction of recidivism is also a goal of RJ, secondary to the restoration of offenders. Proponents argue that it can prevent reoffending and deter other potential criminals. Critics counter that RJ does not significantly influence crime rates. Proponents aver that RJ is more effective than traditional methods, not that it leads to an absolute decrease in crime rates. The majority of the arguments on both sides, however, are theoretical, as the use of restorative practices is recent and is not widespread.

As of 2007, studies that compared recidivism rates are not definitive. While some studies claim modest, relative reductions, others find no significant difference.

Restorative practices

The Restorative Practices (RP) concept has its roots in RJ. RP is an emerging field of practice and study devoted to building social capital and achieving social discipline through participatory learning and decision-making. RP ties together theory, research and practice in fields such as education, counseling, criminal justice, social work and organizational management. The unifying hypothesis of restorative practices is that human beings are happier, more cooperative and productive, and more likely to make positive behavioural changes when others do things with them (via collaboration), rather than to them (via coercion) or for them (via independent action).

In criminal justice, RP circles and conferences allow involved parties to resolve offenses collaboratively. In social work, RP family group decision-making (FGDM) and FGC support collaboration within families, e.g., to protect children. In education, student circles and groups collaborate to peacefully resolve disputes.

The criminal justice field uses the phrase "restorative justice"; social workers say "empowerment";

educators prefer "positive discipline" or "the responsive classroom"; while leadership consultants choose "horizontal management".

RP is spreading in multiple countries, in education, criminal justice, family and youth and-serving and workplace applications.

RJ has not currently succeeded when applied to drug offences, sexual assault and domestic violence. South Australia and New Zealand have attempted RJ with juvenile sexual offenders.

Indigenous regions of Canada have tentatively implemented circle sentencing to deal with domestic violence. Advocates believe that it may be applicable to these indigenous communities because it relates to traditional cultural values of restoring balance in the community. In addition, First Nations have low regard for the local (punitive) court system, in which their people are over-represented in court and in prison.

Since 2000, Kahnawake, a Kanien'kehá:ka reserve, has introduced the use of restorative justice to intervene before an arrest occurs, and to prevent one. Feeling ill-served by the adversarial Canadian system, the community is particularly interested in incorporating restorative justice to work with its younger members and help prevent future offenses. Some Native American nations have also begun to adopt Restorative Justice practices; the Oglala Sioux Tribe of the Pine Ridge Reservation is planning a tribal justice center to include a courtroom for Restorative Justice.

Research

A 2007 meta-study of all research projects concerning restorative justice conferencing published in English between 1986 and 2005 found positive results, specifically for victims:

Greater ability to return to work, to resume normal daily activities, and to sleep

No cases of offenders verbally or violently abusing victims

Reduced fear of the offender (especially for violence victims); lower perceived likelihood of another offense; increased sense of security; reduced anger towards the offender; greater sympathy for the offender and the offender's supporters; greater feelings of trust in others; increased feelings of self-confidence; reduced anxiety

Other findings included:

The only principled basis for selectively allowing, or banning, RJ is harm reduction.

Limited public familiarity and misconceptions about RJ

Greater availability, together with information about victims' positive views is likely to increase the proportion of victims willing to participate.