

## Reparation and Restoration

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## Reparation and Restoration

*Reparation* is a recent addition to domestic criminal justice in common law countries, although it has been a principle of domestic and international law for many centuries. *Restoration* is a recent addition to domestic criminal justice, international law, and transitional justice, having emerged as part of restorative justice in the 1980s. Both concepts are defined and used differently, depending on a writer's domestic or international law frame of reference and theoretical position. Empirical research on reparation and restoration ranges from case studies of countries' truth and reconciliation commissions to randomized field experiments with hundreds of people assigned to "treatment" and "control" groups.

*Restoration* emerged with advocacy, theory, and research associated with restorative justice, beginning in the mid 1980s. Today, restoration and restorative justice are largely confined to domestic criminal justice, although this is changing. For example, restoration now appears in international human rights instruments as an element of restitution,<sup>1</sup> and restorative justice is associated with truth commissions (Roche 2003; Brahm 2004), one mechanism for countries in transitions to democracy and peace. In general, reparation is more often associated with international human rights and humanitarian law and justice mechanisms in connection with war, internal conflict, and states' wrongful acts against other states or against individuals.

Reparation and restoration are *nouns*, but they have cognate meanings and uses *as adjectives*, when referencing types of justice, e.g., reparative and restorative justice. This introduces more definitional variety and imprecision. Furthermore, whether used as nouns or adjectives, the terms are jumping across the literatures on domestic and international criminal

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<sup>1</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Resolution adopted by the United Nations in March 2006), where in section IX, no. 19 it says that "restitution includes as appropriate: restoration of liberty, enjoyment of human rights, identity ...." Hereafter, we refer to this as the UN Resolution (2006).

law and justice. As we shall see next, the terms are not only defined and used differently, they may be used to contrast different modes of justice.

A domestic example is Howard Zehr (1985, reprinted 2003), whose early work identified “two lenses” of retributive and restorative justice, with the latter focused on “restoration, making things right ... on repair of social injury” (pp. 80-81). Subsequent discussions of restorative justice in domestic settings refer not only to repairing harms, but also to “reparative” outcomes (see, e.g., Bottoms 2003; Dignan 2005) and to reparation, which Roche (2003, p.27) says is regarded by many “as an alternative to punishment.” In international settings, REDRESS, a non-government organization for torture victims, describes reparation as “refocusing on the restorative in addition to the retributive” (REDRESS, “What is Reparation,” undated, p. 1). Here, the likely allusion is to mechanisms of “access to justice” *and* “reparation” (the latter including restitution, compensation, among other items), which together form remedies for violations of human rights and humanitarian law in the UN’s Resolution (2006). By contrast, Kiss (2005), who writes from an international law perspective, contrasts “two visions of transitional justice,” retributive and restorative.

Anyone new to the field would be completely lost. Why are key terms being used in different ways? What do reparation, restoration, retributive justice, and restorative justice mean, exactly? What do they include and exclude? Dictionaries do not offer clear guidance, even the specialized ones in criminology and law. This essay aims to bring a semblance of order to a new and popular field of knowledge that often appears to be chaotic and incoherent.

Part I, we give an overview of the varied meanings of reparation, restoration, and restorative justice, as they are applied in domestic and international contexts of law and criminal justice. We also consider why these terms have become popular in recent decades. Parts II and III explore the history, etymology, and uses of the terms reparation, restoration, and restorative justice, and their links to retribution, restitution, and punishment. Part IV reviews a selected set of practices in domestic and international criminal justice, and transitional justice. The practices

associated with reparation and restoration came first, and theories of their social mechanisms came later. Part V describes a selected set of theories, with a focus on behavior, speech, and interaction; and the conclusion considers several key points. We give attention to developments in international law and criminal justice, but our focus is on domestic criminal justice. Here are the essay's main points:

- Reparation, restoration, and restorative justice contain new roles for victims, offenders, and other participants; and new ideas about what should occur. These center on a more informal, dialogic process, which may provide openings for offender remorse and victim validation; active participation by lay actors; and sanctions that are linked in a meaningful way to offenses.
- Writers attribute different meanings to reparation and restoration, depending on their idiosyncratic frame of reference and affiliation with domestic or international criminal justice.
- Etymologically and historically, reparation and restoration developed from similar roots, but they evolved differently in international and domestic criminal justice.
- The international criminal justice field bifurcates “justice” and “reparation,” with the former focused on standard modes of adjudicating and punishing offenders, and the latter, on modes of redress for victims, typically as collectivities. Reparation is an umbrella term that includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.
- The domestic criminal justice field aims to supplement, infuse, or transform conventional criminal justice with ideals and practices of restoration, reparation, and restorative justice. It does not separate “justice” from “reparation” or “restoration.”
- Within international criminal justice, there is a selective, often caricatured, incorporation of ideas about restorative justice.

- Within domestic criminal justice, reparation and restoration are defined and used differently, as are associated terms of restitution and compensation.
- Within domestic criminal justice, there is confusion and debate over the relationship of retribution to restoration and restorative justice, and the relationship of punishment to restorative justice.
- Restorative justice is a contested concept, with different political agendas; it can be misused to refer to any response that involves a community-based penalty; and it has increasingly become an idea without boundaries or limits. The restorative justice field is dynamic, evolving, and extraordinarily varied.

### I. Meanings and Popularity

Analysts of restorative justice, international criminal justice, and transitional justice say there is a lack of consensus on, common misperceptions about, and contested uses of key concepts (see, e.g., Zehr and Toews 2005, chs. 1-3; van Ness and Strong 2006, pp. 22-23; Bradley 2006, pp. 2-3). In part, this has occurred because restorative justice rose to immense global popularity, and in part, because key terms are moving across domestic and international contexts of law and criminal justice.

#### A. *No Settled Definitions*

The problem of definition is most acutely felt by those working within the restorative justice field.<sup>2</sup> By comparison, international law and transitional justice scholars may selectively draw from the literature a particular meaning of restorative justice that suits their analysis. As we shall see, these selected meanings may be caricatured and in error, and this introduces further problems in defining terms.

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<sup>2</sup> Hereafter, when referring to “the restorative justice field,” we mean those who consider its application mainly in domestic contexts, and particularly in criminal justice.

Five major reasons can be given for a lack of a settled definition of restorative justice and its key terms. First, as van Ness and Strong (2006, pp. 23, 33-35) note, restorative justice “has developed in a piecemeal fashion,” with significant temporal and national variation across the world and with distinct “stages of growth.” Early practices included victim-offender reconciliation, community justice, and mediation and reparation projects in Canada, the United States, Norway, Finland, and England in the mid-1970s to mid-1980s. In the 1990s, significant growth and expansion occurred, with widely varying models and programs increasingly branded as “restorative justice,” both within and outside the criminal justice system. In 2002, the United Nations Economic and Social Council endorsed the use of restorative justice in criminal matters, encouraging member states to reform their domestic criminal justice systems. In that Resolution (2002), the definitions of “restorative process” and “restorative outcome” include activities at all stages of the criminal justice process (see van Ness and Strong 2006, pp. 207-13). A significant limitation, which advocates rarely note, is that restorative justice is not a system of justice. Specifically, it has no fact-finding mechanism, at least not yet; its focus is on the penalty and post-penalty phase of the criminal process.

Second, is the popularity of the idea of restorative justice.<sup>3</sup> It rode on the waves of its predecessors in domestic criminal justice in the 1970s and 1980s—a range of restitution, reparation, reconciliation, and informal justice projects—and its momentum picked up any justice activity, which remotely seemed alternative, in its path. As Davis, Boucherat, and Watson (1988, p.127) observe with respect to the “mild splutter of interest in the concept of ‘reparation’ from offender to victim” during the mid 1980s, reparation was “another of those abstract ideas, lacking precise definition, which can, for a while, appeal to everyone.” So too for restorative justice. A decade later Marshall (1997, p.2) said that many names were given to new justice ideas that had been proposed in the previous decade or so. Among them were communitarian, neighborhood, progressive, reparative, holistic, real, negotiated, balanced,

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<sup>3</sup> See Bottoms (2003) for a more detailed analysis of why and where restorative justice has been popular.

restitutive, relational, community, alternative, participatory, and transformative justice.

“Whatever the term,” he said, “the tendency is to bring in everything.” So too for restorative justice. By the mid to late 1990s, it emerged as the victor among many competitors in the “new justice” race.<sup>4</sup> Inclusive, capacious, and aspirational, restorative justice seemed to offer something for everyone. Its immense popularity attracted more recruits and advocates (along with a few critics and skeptics), not only in academia, but also in government and practice sectors.

With so many people involved, often with a partial view of the burgeoning literature in the area, discussion and critique flew in many directions, unfettered by concepts that had fixed meanings or referents. The term was applied to many different types of activities within criminal justice, some of which were only distantly related or not related at all. The term was also applied to non criminal justice contexts, for example, to child welfare cases, schools, and other workplace organizations. Its popularity reached into many humanities and social science disciplines, including law, criminology and criminal justice, linguistics, politics, sociology, psychology, international relations, among others. Thus, discussions of meanings, practices, and effects took widely different forms, depending on a writer’s disciplinary lens, and academic, policy, or practice location.

Third, the major theorists of and contributors to the restorative justice field have divergent views on what it is and what it includes. This point is developed more below, but several examples suffice for now. Although his ideas have evolved and continue to change, Braithwaite (2002a, 2002b) applies his “republican normative theory” or “civic republican perspective” to identify a mix of restorative justice values and processes. Drawing from several UN human rights declarations, Braithwaite (2002b, 2003) identifies more than twenty values (or standards) that should inform restorative justice practice. His conception of restorative justice is not limited to crime and criminal justice, but construed broadly in normative and transformative

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<sup>4</sup> Although restorative and reparative justice connote different meanings, it may be an accident of history that restorative, not reparative justice was the victor.

terms: it is “about struggling against injustice in the most restorative way we can imagine” (Braithwaite 2003, p.1). He argues for applying restorative justice not just to youth offenders, but also to adult offenders, war crime, corporate crime, world peacemaking, and sustainable development. Other well-known figures in the restorative justice field (e.g., Zehr 1990, 2002; van Ness and Strong 2006) restrict their analyses to domestic crime and criminal justice, or at times, to community conflicts. A second area of debate is what concepts or theories are part of restorative justice. Some of us argue that retribution and punishment can be coherently related to restorative justice (e.g., Daly 2001, 2002; Duff 2002); others disagree (e.g., Braithwaite 2002*b*, 2003; Walgrave 2003, 2004, 2008).

Fourth, in the late 1990s, the idea of restorative justice was adopted by transitional justice analysts, initially with regard to South Africa’s Truth and Reconciliation Commission and local courts in post-conflict Rwanda (Minow 1998; Drumbl 2000). A jumping across the domestic and international criminal justice literatures has occurred without a full appreciation that such terms as restoration and reparation mean different things when applied to common crime in domestic criminal justice in affluent nations, compared to human rights abuses and violations of humanitarian law in poorer, non-democratic, and war-torn nations. For the former, the focus is typically on processes and outcomes that “repair the harm” (and for some, address the wrong) for an individual victim of a common crime carried out by another individual in a democratic society at peace. For the latter, the focus is on redressing victimization and death arising from state terror, abuses of power by security and political officials, and confiscation of property and displacement resulting from internal conflicts and war. In this latter context, restorative justice and restoration are concerned not only with individuals, but also collectivities, and with regime change and state building. International human rights and transitional justice writers have selectively incorporated elements of, or re-defined, “restorative justice” and “restoration” to suit their specific frame of reference. Thus, key terms have come to signify differing meanings and

aspirations in the domestic criminal justice, transitional justice, and international criminal justice literatures.

Fifth, and related, in the international law and transitional justice literatures, we find better guidance for defining some key terms. For example, reparation was first defined explicitly in international law in a 1928 case heard in the Permanent Court of International Justice, although there is considerable debate as to whether the principles in that case are applicable to all breaches of international law (Gray 1999, p.418, discussing the *Chorzow Factory* case). In 1996, the United Nations International Law Commission released Draft Articles concerning “the rights of the injured state and obligations of the state which has committed an internationally wrongful act,” which defined key terms such as reparation, restitution, and compensation (1996, p. 134). About a decade later, in March 2006, the United Nations finalized these articles. The UN Resolution (2006)<sup>5</sup> set out three major rights for victims of international human rights and humanitarian law: access to justice, adequate reparation, and access to information. Further, it identified five major forms that reparation may take: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Transitional justice scholars are reflecting and building upon these principles and guidelines, and identifying the ways that they may be put into practice (de Greiff 2006*b*; Verdeja 2006; Magarrell 2009). Increasing attention has been paid to women, gender, and reparation (Rubio-Marín 2006, 2009; Bell and O’Rourke 2007; Rubio-Marín and de Greiff, 2007). The Nairobi Declaration on the Rights of Women and Girls to a Remedy and Reparation, drafted in March 2006, is premised on taking a more explicit victims’ perspective to gendered violence, and on re-defining reparation to include a transformative and participatory process (Couillard 2007). The UN Resolution (2006) and the Nairobi Declaration (2007) were constructed with particular justice contexts in mind, i.e., human rights abuses (including gendered-based violence) during war, internal conflicts, and repressive political

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<sup>5</sup> In the transitional justice literature, this Resolution is referred to as the Basic Principles, the shorthand for *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.

regimes; but there is a degree of cross-over in the international and domestic criminal justice literatures when scholars and activists consider the “symbolic” and “material” forms that reparation and restoration take.

### *B. Immense Popularity*

Domestic criminal justice uses of restorative justice, social movements to “end impunity” in international criminal justice, and sustained efforts to effect democracy in transitional justice, have all enjoyed immense popularity and tremendous growth since the late 1980s. Why has this occurred? Although we can recognize that there are widely different justice contexts, there are three points of common concern for those working in these justice fields.

First, all identify the need for justice mechanisms for victims, not just offenders. This is a recent development for domestic criminal justice, international criminal justice, and transitional justice, although it was set in motion with different types of rights claims (i.e., victims’ rights and human rights). Second, all recognize the limits of conventional methods of prosecution and trial. In domestic criminal justice, the failure of the criminal justice system to deter offenders and aid or “heal” victims is emphasized by all restorative justice advocates. In international criminal justice, the costs of prosecuting individuals for gross human rights violations and crimes against humanity are prohibitive. Combs (2007, p.2) notes that “genocide trials are not cheap. ... [The tribunals for the former Yugoslavia and Rwanda] spend more than \$200 million per year to prosecute perhaps a dozen people.” For transitional justice, commentators suggest the need for “several measures that complement one another,” and they note that “without any truth-telling or reparation efforts, punishing a small number of perpetrators can be viewed as a form of political revenge” (International Center for Transitional Justice 2008, p. 2; see also Minow 1998). Third, reparation and restoration are new types of aims and purposes for criminal justice. They may sit in an uncertain relationship to other aims and purposes that are expressly about establishing guilt and punishing individual offenders. They contain new, more active roles for victims, offenders,

and other participants; and new ideas about what can occur in justice activities. These new roles, activities, and outcomes are attractive to many people; they spark excitement about more meaningful and effective ways of doing justice.

## II. History and Development of Key Terms

The development of reparation and restoration in international law and domestic criminal justice has proceeded on separate tracks, until recently. Today, in international law, reparation is the overarching concept, with restorative justice or restoration as secondary terms. In domestic criminal justice, restorative justice is the overarching concept, with reparation or restoration as secondary terms. There are some exceptions. Case and country examples of transitional justice show that international or domestic criminal prosecutions may be combined with reparation and with approaches that are now termed restorative justice. Restorative justice has also been brought into international criminal justice as a proposed procedural mechanism in prosecuting war crime and genocide (Combs 2007).

### A. *Etymological Mingling*

One dictionary shows that from the late fourteenth century, reparation was associated with repairing and restoration, and then later, with compensation for war damages:

c. 1384, from LL. *reparationem* (nom. *reparatio*) “act of repairing, restoration,” from L. *reparatus*, pp. of *reparare* “restore” (see *repair* (1)). Meaning “act of repairing or mending” is attested from c. 1400. Reparations “compensation for war damages owed by an aggressor” is attested from 1921, from Fr. *réparations* (1991). (Harper 2001, p. 1)

Etymologically, reparation includes repairing, setting right, and making amends, and also to restore to good condition. Drawing from *Webster’s Third International Dictionary* (1923, 1936, unabridged 1966), Jacob (1970) notes that reparation is a broad concept that includes restitution, although each of these concepts refers to payment from an offender to a victim, and as an “act of

restoring.” Likewise, Nehusi (2000, p. 31) suggests there are “a number of meanings or shades of meanings” of reparation, including “to restore, ... to set right, or make amends.”

One point raised by several observers (e.g., Ashworth and von Hirsch 1993, p. 11; Daly and Immariageon 1998, p. 40, fn. 17) is the “mnemonic attractiveness” and frequency of “R words” in discussions of restorative justice. They include recognition, redistribution, repair, remedy, rehabilitation, reconciliation, reintegration, restitution, restore and restoration, redeem, redress, and retribution. Why is this the case? When examining the etymology of “re,” its Latin source refers to “back” or “backwards,” although the precise sense of “re” is not necessarily fixed in Latin usage, and secondary meanings can emerge. Etymologically and in contemporary thinking, reparation and restoration are associated with addressing past damages and wrongs. In this light, retribution, which is associated with addressing past crime would seem to be logically related to reparation and restoration. This point has recently been acknowledged by well-known restorative justice advocates (e.g., Zehr 2002; Walgrave 2004).

### *B. Reparation and Restoration in Domestic and International Law and Criminal Justice*

There are significant differences in how key terms such as reparation, restitution, and restoration are defined and used in the domestic and international criminal justice literatures. In the domestic literature, one often sees a contrast drawn between the aims and elements of conventional criminal justice and those of restorative justice, the latter depicted as the superior justice form. In the international domain, restorative justice is proposed as a parallel process that works alongside or is part of, but not constitutive of, criminal justice.

*1. Domestic Law.* For the uses of reparation in domestic law, there are several historical accounts of Anglo-Saxon law, but we draw authority from Schafer (1968). During the tenth century, the principles of compensation (wer, bot, and wite)<sup>6</sup> replaced earlier group- and

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<sup>6</sup> The wer was a “payment to a family for the death of one of its members; the bot ... a family payment for injuries less than death; and the wite, a sum of money paid to the lords to cover the cost of over-seeing the system of compensation” (Hudson and Galaway 1975, p. xix; see also Schafer 1968).

individual-based forms of retaliation and revenge. Increasing centralization of the state and sovereign replaced the authority of smaller family or kin groups in criminal matters. During the twelfth and thirteenth centuries, the state (represented by the king) assumed the role of offended party. Crimes (public wrongs or breaches of the “King’s Peace”) began to be differentiated from private wrongs; and offenders were required to pay fines to the state, rather than direct compensation to a victim. From the sixteenth to the nineteenth century, various figures, including Sir Thomas Moore, Jeremy Bentham, and Herbert Spencer, suggested elements of reparation be used in criminal justice. They proposed, respectively, that offenders perform community work and restitution to a victim, pay compensation to a victim or restitution in kind, and pay income from prison work as compensation to a victim.

In the 1950s, interest in reparation to victims was reawakened with the work of penal reformer Margaret Fry. Fry initially argued that offenders should pay damages to victims, emphasizing its potential for rehabilitation: “repayment is the best first step towards reformation that a dishonest person can take” (Fry 1951, p. 126). However, she subsequently proposed that the state should assume responsibility for offender rehabilitation *and* victim compensation through social welfare (Fry 1959). Schafer (1968) reported findings from a survey of twenty-nine countries and concluded that “restitution or compensation to victims of crime is restricted to payment of civil damages, and its inclusion in criminal law would be regarded as an achievement” (p. 109).

In the 1960s, state compensation to crime victims emerged in New Zealand, Great Britain and the United States (see Jacob 1970).<sup>7</sup> Such programs have since expanded worldwide; they vary in scope, operation, amounts of compensation, and eligibility (see Goodey 2003; Miers 2007), all of which are beyond the scope of this chapter. During the 1970s and 1980s, victim compensation as part of the sentencing process came to be associated with “restitution” (Barnett 1977) and “reparation” (Campbell 1984). Divergent views soon became apparent: Barnett

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<sup>7</sup> Jacob (1970) uses the term Great Britain. Throughout this chapter, we preserve the geographical names of places that authors themselves cite.

wanted to remove a punitive intent from compensation, whereas Campbell argued that compensation should be viewed as a type of punishment, drawing from Schafer (1960). By the 1990s, with increased attention to how restitution or compensation related to criminal justice, reparation was associated with a wider set of aims. Lucia Zedner's (1994, p. 234) discussion of the key concepts in "reparative justice" notes that

Compensation suggests a civil purpose ... which misses the penal character, ... restitution seems too narrow a term, suggesting little more than the returning of property or its financial equivalent ... Reparation is not synonymous with restitution, still less does it suggest a straightforward importation of civil into criminal law. ... [It] should connote a wider set of aims.

She suggests that the wider aims would include not only "'making good' the damage [but also] ... recognition of the harm done to the social relationship between victim and offender" (p. 234). On this view, we would infer that reparative justice, which soon was re-branded as restorative justice, should include notions of addressing the "harm" (damages) and the "wrong" (crime) (see also Watson, Boucherat, and Davis 1989). However, many in the restorative justice field resist the idea that reparation or restoration should have a punitive quality or elements of punishment.

2. *International Law*. In international law, reparation is used in two ways. Drawing from the *Encyclopedia of Public International Law*, Vol. 4 (Bernhardt and MacAlister 1992, p. 178), the earliest use, dating from the mid sixteenth century was a victor's entitlement to a "tribute on the vanquished ... for internationally wrongful acts," which served not only as "reparation .... [but] also as punishment and atonement." Such tributes or "war indemnities" became a common feature of a victor's claim to cover war costs, from the end of the eighteenth century on. After World War I, reparation replaced the term war indemnities, and the term was used in treaties of peace after the war. Today, reparation refers generally to a state's entitlement against another state to seek redress for "internationally wrongful acts," not just those related to war.

A second use of the term evolved from a series of international instruments on human rights, beginning post World War II with *The Universal Declaration of Human Rights* (1948). These center on an individual's rights as a subject in international law to pursue violations of human rights and humanitarian law. Section VII of the UN Resolution (2006) identifies three rights for victims: "... access to justice, ... reparation for harm suffered, [and] access to relevant information concerning violations and reparation mechanisms" (p. 6 of A/RES/60/147). In section IX, reparation is defined as taking these forms: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>8</sup> Because this UN Resolution (2006) now stands as the key document in defining rights, remedies, and reparation for victims in international human rights and humanitarian law, we briefly compare its terms and definitions with those used in the restorative justice field, in five areas.<sup>9</sup>

First, the definition of restitution in the UN Resolution (2006) is to restore a person to their original position, with an emphasis on *restoration* of human rights and lost property and employment. By comparison, in domestic contexts, restitution normally refers to the return of lost property, e.g., the return of a stolen bicycle in the same condition before it was stolen. As we shall see in Part III, the matter is further complicated by the fact that there is no consistent use of key terms by those in the restorative justice field. For example, monetary or material forms of recompense are variably referred to as compensation, reparation, restitution, and so forth; and emotional (or non-material) restoration is defined in different ways. Varied uses of terms in international and domestic criminal justice settings arise, in part, because violations of human rights and humanitarian law have both a collective and individual component, whereas

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<sup>8</sup> de Greiff (2006*b*), among others, refers to these as reparations (see pp. 452-53 for the distinction he draws between reparation and reparations). In the literature, analysts have other views and variably use the singular or plural form. Here, we preserve their original language; however, we refer to reparation in the singular.

<sup>9</sup> We consider only those terms relevant to restorative justice in domestic settings, i.e., restitution, compensation, and satisfaction. Rehabilitation for victims is not part of domestic criminal justice, although some believe that it should be (Coker 2000, 2002); and except for assurances of a victim's safety, the guarantees of non-repetition are not apt. One important difference between the UN Resolution (2006) and domestic criminal justice codes is that the Resolution recognizes that a person can be a "victim regardless of whether the perpetrator ... is identified, apprehended, prosecuted, or convicted ..." (p. 6). In domestic contexts, this is applicable in some state compensation schemes.

violations of criminal law are largely individual. For example, writing from an international law context, Atuahene (2007, pp. 31-32) conceives of restoration as *a people's* reconnection to society as valued and active citizens. By contrast, in domestic settings, the referent is to restoring an *individual's* security or the bonds between individuals.

Second, compensation generally has a similar meaning across international and domestic legal settings: it is an economic means by which physical harms and damages are calculated and money paid to victims. However, in the classic early writings that came to be associated with restorative justice in domestic settings by Eglash (e.g., 1957-58a, 1977) and Barnett (1977) (discussed in Part III), *restitution* was the term used to refer to money or labor, given in lieu of money payments, to a victim.<sup>10</sup> In contrast, Campbell (1984, p. 339) defined *reparation* as criminal justice schemes for victim compensation, when an offender takes an active role, differentiating these from welfare schemes and state-based compensation. Today, in restorative justice texts, restitution and reparation are both used to refer to financial or labor modes of “making amends” or recompensing a victim; compensation is sometimes used in its more restrictive sense, or used interchangeably with restitution.

Third, the UN Resolution (2006) defines satisfaction to encompass varied actions that constitute non-material or symbolic forms of reparation. Apologies, commemorations and memorials, and official pronouncements are all ways that wrongs suffered by victims can be recognized and validated. In domestic contexts of restorative justice, the “core sequence” of genuine shame and remorse expressed by an offender and some steps toward forgiveness by a victim is termed symbolic reparation (Retzinger and Scheff 1996), although some suggest that an

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<sup>10</sup> Roberts (2009, p. 163) says that financial recompense to a victim is referred to as *compensatory* in the United Kingdom and *restitutive* in the United States. Writing from a British context, Ashworth (1986) says that compensation refers to both individual and state payments to a victim, whereas in the United States, it usually refers only to state payments to victims.

apology alone is symbolic reparation (Strang 2001, p. 185). Other related outcomes in domestic settings are noted, such as handshakes, smiles, or other gestures of conciliation and friendship.<sup>11</sup>

Fourth, in the UN Resolution (2006), reparation is one of three rights victims have. Another is access to justice, which includes administrative, civil, or criminal actions and remedies for individuals. Thus, in the international context, “justice” and “reparation” are distinct remedies.<sup>12</sup> However, in domestic contexts of restorative justice, the terms are collapsed. In part, this is because the focus is on processes and outcomes post-plea,<sup>13</sup> and in part, it reflects a desire by many restorative justice advocates to replace penal sanctions and punishment (“justice”) with a new justice form (“reparation” or “restoration”).

Finally, there are key differences in international and domestic instruments concerning reparation and restorative justice. This is evident when comparing the UN Resolution (2006), which focuses on international criminal justice, and the UN’s Economic and Social Council Resolution (2002), which focuses on restorative justice in domestic criminal justice. In the latter, restorative justice is defined as “an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders, and communities” (Annex). Restoration is never mentioned in the text; rather, the closest terms used are addressing participants’ “needs” and achieving “reintegration.” Nor are reparation and restitution defined. By comparison to the UN Resolution (2006), which stipulates that victims have rights of redress in the absence of the identification, arrest, or conviction of a perpetrator, the UN’s Council Resolution (2002) sees restorative justice as an activity running parallel to a criminal justice process. In general, the latter sets forth guidelines

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<sup>11</sup> These are viewed as indicators of “restorativeness” between victims, offenders, and/or their supporters (Daly 2001, 2003), “reintegration” (Roche 2003, p. 30, drawing from Braithwaite 1989), or the second step in Retzinger and Scheff’s (1996) core sequence.

<sup>12</sup> This distinction is challenged by the Nairobi Declaration (2007), which seeks “comprehensive reparations for victims of sexual violence and reaffirms the need for both restorative and retributive justice” (Couillard 2007, p. 447).

<sup>13</sup> There can be exceptions to this, of course; for example, restorative justice processes could occur in the absence of offenders or admissions to offending (Coates, Umbreit, and Vos 2006).

for restorative justice as a legal process (having elements of a mediated civil hearing, it appears), but not a fully criminal justice process.<sup>14</sup>

*C. Retribution and Punishment: Are They Related to Restoration or Are They “Dirty Words”?*

There is debate and confusion about the relationship of retribution and what is termed “retributive justice” to restoration and restorative justice, and the relationship of punishment to restorative justice. This state of affairs can be traced to two impulses.

First, when proponents introduce new ideas into the justice field, they use strong contrasts or dualisms to bring into dramatic relief the failure of the “older” justice and the benefits of and the need for a new justice form. This discursive frame is evident in Mead’s (1917-18, reprinted 1998) paper on “The Psychology of Punitive Justice,”<sup>15</sup> where he contrasted two methods of responding to crime, one using an “attitude of hostility toward the lawbreaker” and the other, a “reconstructive attitude.” Whereas the former “brings with it the attitudes of retribution, repression, and exclusion” (pp. 47-48), the latter tries to “understand the causes of social and individual breakdown, to mend ... the defective situation .... not to place punishment but to obtain future results” (p. 52). When arguing for a new justice form, proponents caricature elements in the older form. They do not present a true comparison, but rather a simple dichotomy, using comparison terms that have a nice ring to them. This is what Zehr (1985) did in comparing the two lenses of retributive and restorative justice to contrast, respectively, conventional criminal justice with a proposed new justice form. In his comparison, “retributive justice” in fact refers to elements in conventional criminal justice that had to be replaced, although at the time, Zehr did not see it this way. Words such as “retribution,” “retributive,” or

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<sup>14</sup> Many justice activities that are now called restorative justice (e.g., youth diversionary and pre-sentence conferences in Australia, New Zealand, and elsewhere) do not fully accord with the elements set forth in the Resolution (2002). For example, conferences are part of the criminal justice process, they operate under police and court discretionary criteria, and outcomes are recorded in offenders’ criminal histories.

<sup>15</sup> Mead was making this argument to defend the merits of an emerging juvenile court.

retributive justice,” which are on the negative side of the dualism,<sup>16</sup> refer to what is wrong or has failed with conventional justice system practices.

Second, as evidenced in Mead in the early twentieth century and the work of Barnett (1977),<sup>17</sup> is a distaste for “punishment” and a desire for a more enlightened response to crime. Barnett argues that the “paradigm of punishment ... [has] lost “its moral legitimacy and its practical efficacy” (p. 285). In its place, he proposes a restitutive system, which, he concedes at the end of his paper, collapses the distinction between crime and tort (p. 299). Barnett’s position is an early argument for the “civilization thesis” in two meanings of that concept: to bring offenders under civil, not criminal law; and to have a more enlightened response to acts called “crime” (p. 300).<sup>18</sup> He equates punishment with “retributive justice,” and calls for non-punitive forms of restitution (“pure restitution,” p. 288). His ideas raise questions for how elements of civil law could be incorporated within restorative justice in domestic settings (see Johnstone 2003, pp. 8-14). Like Barnett, some restorative justice advocates say they are against punishment or punitive modes of intervention; they believe that because the “intention of the punisher” in a restorative justice process is a constructive one, the outcome is not punishment (Walgrave 2004, pp. 48-49). Others argue that despite the benevolent intentions of advocates, the criminal justice process is coercive and can impose burdens on offenders; consequently, restorative justice sanctions (or outcomes) are, and will be experienced as, punishment to offenders (Daly 2000, 2002; Crawford and Newburn 2003, pp. 46-47; see also Levrant et al. 1999).

What explains the aversion by some to punishment? Drawing from Garland (1990, discussing Elias, ch. 10), it likely reflects changing sensibilities about what are “civilized”

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<sup>16</sup> Or, as Roche (2007, p. 78) suggests, “‘retributive justice’ is [considered] a dirty word, not a theory of punishment.” See Roche (2007) and Crawford and Newburn (2003, pp. 45-46) for good summaries of the relationship of retribution and punishment to restorative justice.

<sup>17</sup> In fact, Zehr’s (1985) argument draws a good deal more from Barnett’s (1977) formulation than is often credited. Barnett developed the idea of a Kuhnian paradigm “shift of world view” (p. 287) from punishment to restitution; and the definition of crime as an offense against an individual, not society (or the state).

<sup>18</sup> See Bottoms (2003) for discussion of the “civilization thesis” and the problems it raises for restorative justice.

methods of responding to crime.<sup>19</sup> Punishment conjures a variety of images in people's heads, but for many in the restorative justice field, it is frequently equated with prison and other forms of unacceptable ("uncivilized") pain infliction. What is believed to be more acceptable are constructive efforts by an offender to do something for a victim ("to mend the situation"), whether by working for a victim or paying back money or property in some way. However, as Johnstone (2003, p. 22) suggests, such outcomes are punitive because they are coerced or imposed as a burden.

How restorative justice practices should relate to punishment is keenly contested. Some argue that incarceration and fines are punishments because they are *intended deprivations*, whereas probation or what are termed "reparative measures" (such as doing work for a crime victim) are not punishment because they are *intended to be constructive* (Wright 1991). Others define punishment more broadly to include anything that is unpleasant, a burden, or an imposition; the intentions of a decision-maker are less significant (Davis 1992; Duff 2001). Barnett's (1977) contrast of *punitive* and *pure* restitution illustrates the fine line that is often drawn between "punishment" and "non-punishment." In punitive restitution, an offender is forced to compensate a victim; in pure restitution, an offender returns stolen goods or money (or "makes good" in some way), but the aim is not that the offender should suffer, but that a victim "desires compensation" (Barnett 1977, p. 289).

Related to debates about punishment is the role of retribution in restorative practices. According to Cottingham (1979), philosophers have put forward at least nine theories of retribution to justify punishment, although he believes that there is a "basic sense" of what the term means: repayment (p. 238). Although he argues that the relationship between repayment and "inflicting suffering" (i.e., punishment) is "left unexplained," it is "both ancient and widely held" (p. 238). For this reason, he says that the "repayment sense" of retribution should be viewed as a metaphor more than a theory of punishment. Cottingham's observations help us to

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<sup>19</sup> This connection to Elias was also made by Walgrave (2004, p. 24), who says that "maybe the next step in civilization is to reduce state violence itself by not taking for granted pain infliction after a crime."

see why there are varied meanings of retribution in the restorative justice field. Some use the term to describe a *desert justification* for punishment (e.g., intended to be in proportion to the harm caused; see Walgrave and Aertsen 1996), whereas others use it to describe a *form* of punishment. For the latter, some use retribution in a *neutral* way to refer to a censuring of harms (e.g., Duff 1996), whereas most use the term to connote a *punitive* response, which is associated with the intention to inflict pain (Wright 1991).

In the early years of restorative justice, the strong contrast drawn between retributive justice and restorative justice may have been an “elegant and catchy exposition” (Roche 2007, p. 87), but it is now seen as a caricature, with little foundation. We can observe, for example, that in the last century and a half, criminal justice has wavered between desires to treat some and punish others; and there are multiple, often contrary, aims, purposes, and practices of criminal justice. For some writers, it was clear early on that apparently contrary principles of retribution and reparation (or restoration) were not antithetical, but complementary or dependent upon one another (see, e.g., Duff 1992, 1996, 2001; Hampton 1992, 1998; Zedner 1994; Bottoms 1998; Daly 2000). More recently, Zehr (2002), Walgrave (2004), and van Ness and Strong (2006) have conceded that the better comparison is between conventional criminal justice and restorative justice, and that retribution does have a place in restorative processes.

Any comparison of conventional criminal justice with proposed newer forms (e.g., restorative or reparative justice) must acknowledge that the new forms deal only with the *post-plea* or *penalty phase* of the criminal process. There is as yet no “restorative” or “reparative” mechanism of adjudication; and thus, no justice system is based on these ideas. Often we hear that restorative justice differs from established criminal justice in being participatory and consensually based, not adversarial. This may sound pleasing, but it is misleading. Established criminal justice is adversarial because adjudicating crime rests on a right of those accused to

defend themselves against the state's allegations of wrong-doing.<sup>20</sup> There may, of course, be better ways to adjudicate; but no one believes we should dispense with the right of citizens to defend themselves against the state's power to prosecute and punish alleged crime. Thus, whether we call it restorative, reparative, or restitutive justice, none can yet replace conventional criminal justice unless mechanisms for fact-finding are identified. It is striking how often the domestic restorative justice literature overlooks this fact.

### III. Restorative Justice

As described in Daly and Immarigeon (1998), challenges to conventional criminal justice emerged, in part, from civil rights and women's movements of the 1960s, which identified race- and gender-based mistreatment of offenders and victims in the criminal justice process.

Practices that would become associated with restorative justice grew out of activities and programs developed in the 1970s and 1980s, including alternatives to prisons, community boards and neighborhood justice centers, victim-offender mediation, reparation projects, and post-sentence victim-offender reconciliation. Paralleling these activities was academic research and theories emerging in the 1970s and 1980s on informal justice, abolitionism, restitution, and reintegrative shaming.

#### A. *Early Ideas*

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

##### 1. *Eglash*. The introduction of the term "restorative justice" is credited to Albert Eglash.

An academic psychologist based in the Midwest and then in Maryland, Eglash was actively

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<sup>20</sup> Although the term "adversarial" is associated with specific mechanisms by which "truth" is discerned in common law adjudication, the presumption of innocence and right to defend oneself against the state's allegations is, of course, also part of inquisitorial adjudication in civil law countries.

involved in programs for youth offenders and adult prisoners. He drew from these experiences in outlining a “creative” meaning of restitution, comparing it to a conventional meaning, in several articles written in the late 1950s (Eglash 1957-58a, 1957-58b, 1959-60) (see table 1).

Creative restitution aims to be constructive, varied depending on context, offender self-determined but guided, and related to constructive acts for a victim or others (Eglash 1957-58a). Eglash distinguished the “first mile” of the return of property under court order or by the expectations of friends and family from the “second mile” of restitution “in its broad meaning of a complete restoration of good will and harmony. Creative restitution requires that a situation be left better than before an offense was committed” (p. 620). Eglash also assumed that restitution should be “life long” and a “form of psychological exercise” (p. 622) that would encourage human growth and “ease stigma” (p. 621). At the article’s close, Eglash (1957-58a, p. 621) reflects on whether restitution is the correct term, when “restoration, redeeming, or redemption” may be preferable. He elects to “use restitution in [the] broader sense,” and to “use reparations or indemnity for the narrower term of mandatory financial settlement.” Restorative justice does not appear in this article or the two others produced at this time (1957-58b, 1959-60; but see fn. 19).

Nearly two decades later Eglash (1977) explicitly used the term restorative justice.<sup>21</sup> He defined it as the “technique of [creative] restitution” (Eglash 1977, p. 91), contrasting it to retributive and distributive justice, which use techniques of punishment and treatment, respectively. Creative restitution is also called “guided restitution,” in which an offender is required to make amends for an offense, “but is free to determine what form this amends will take” (Eglash 1977, p. 93). The elements of the “restitutional act” are an “active, effortful role,”

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<sup>21</sup> The story is a bit more complicated. In Eglash (1957-58b), he says “the relationship between offense and restitution is reparative, restorative” (p. 20). In Eglash (1959-60, p. 116), the term “restorative justice” appears, but it is indented in the text as “condensed” from Schrey, Whitehouse, and Walz (1955), which is an English translation of a German text, *The Biblical Doctrine of Justice and Law*. Skelton’s LLD (2005, pp. 84-89) research discovered that the third author, the Reverend Whitehouse, carried out a translation and adaptation of the original text; and he created the term “restorative justice” from the German expression “*heilende Gerechtigkeit*” (“healing justice”). It was argued that restorative justice added a “fourth dimension” to justice and differed from secular forms of retributive, commutative, and distributive justice in that it “can heal the ... wound of sin” (Skelton 2005, p. 88).

which is “constructive [and] directed toward the victim, and related to the damage or harm resulting from the offense.” That relationship is seen as “reparative of the damage done to a person or property” (p. 94). Eglash again includes “the second mile” by saying that creative restitution goes “beyond coercion into a creative act” by leaving a situation better than before (p. 95). He says that creative or guided restitution “fits best as a requirement of probation,” but gives no indication of how it relates to other sentence elements. He concludes by saying he is “offender oriented,” “seldom thinks about the victim,” has “never visited any victims,” and it never occurred to him to ask victims what they thought of creative restitution. Rather, his proposal is concerned with offenders, and “any benefit to victims is a bonus, gravy” (p. 99).

Restorative justice, as Eglash (1977) defines it, is some distance from principles and practices associated with it today. However, some similarities can be discerned: a strong contrast between the failure of old, and the superiority of a new, justice form; relating an offender’s “effortful role” to the damage and harm caused by an offense; and an overly optimistic view of offenders’ abilities and interests to want to go “the second mile.”

2. *Barnett*. Randy Barnett’s (1977) proposal for “a new paradigm” of restitutorial justice has elements that are more directly traceable to emerging ideas of restorative justice in domestic settings. This is because he defines crime as an offense of one person against another (rather than against the state), defines justice as a “culpable offender making good the loss” caused, and says that he is “against” punishment. In its place he proposes “pure restitution” (rather than “punitive restitution,” which is forced compensation or imposed fines). The goal is “reparations paid to the victim” (p. 289), which would be ordered, when an offender is “sentenced to make restitution to the victim” (p. 289). In Barnett’s analysis, reparations (he uses the plural) and restitution refer to the same thing: financial payments. He considers a variety of ways of “repaying the victim” (pp. 289-91) and addresses potential objections of his proposal. Johnstone (2003, pp. 21-22, 26 fn. 4) suggests that Barnett does not satisfactorily explain why “we are not entitled to impose punishment upon offenders but are entitled to *force* them to pay

restitution” (emphasis in original). For example, Barnett argues for “pure restitution,” but says that this is accomplished by sentencing an offender to make restitution. It is difficult to see how this differs from sentencing an offender to pay compensation.<sup>22</sup>

3. *Zehr*. Howard Zehr’s (1985, reprinted 2003, pp. 69-82) contrast of retributive and restorative justice tracks Barnett’s argument closely in several ways, but departs from it in others. Zehr also argues for a new paradigm, but he calls it restorative justice. Like Barnett, he redefines crime (an offense between two individuals), but has many more terms associated with justice, including restoration, reconciliation, the process of making things right, right relationships measured by the outcome, repair of social injury, and healing. Like Barnett, his preferred response is restitution, which he sees “as a means of restoring *both* parties” (p. 81, emphasis in original), not as a type of punishment. Zehr is also concerned with addressing conflict between individuals: he calls for offenders and victims “to see one another as persons, to establish or re-establish a relationship” (p. 79). Compared to Barnett, who draws mainly from legal authority, Zehr draws from religious history and Judeo-Christian ideals. His work with the Victim-Offender Reconciliation Project, a Mennonite-based program that facilitated meetings between victims and imprisoned offenders, informed a good deal of his early thinking about restorative justice.

4. *Christie*. Of the four writers, Nils Christie (1977, reprinted 2003, pp. 57-68) focuses more on the processes and procedures of optimal justice activities than sanctions alone. His article opens by taking us to a small village in Tanzania, where there is a conflict about property after a marital engagement broke off. He approves of the way the dispute (a civil matter) is settled: the protagonists are at the center of attention, with family members and other villagers

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<sup>22</sup> This is Campbell’s (1984) argument: reparation (which he defines as criminal justice schemes for victim compensation) is a “form of punishment” (p. 347), not in opposition to it. Thus, “the idea of compensation as punishment is in general a restoration of the moral breach between victim and offender created by the offence” (p. 346). Ashworth (1986) argues that the state should punish an “offender’s mental attitude ... so as to restore the order of justice in the community which was disrupted by the crime” (p. 97), and this should be distinguished from a victim’s right to also receive compensation. At the same time, he viewed the (then) new British compensation order as an appropriate sentence outcome.

participating. They are the experts, not the judges.<sup>23</sup> Christie puts forward two related points. First, professionals, especially lawyers “are particularly good at stealing conflicts” (p. 59) between individuals. Second, these conflicts should be seen “as property” because they have great value. They offer a chance for people to participate in society, they provide “opportunities for norm clarification,” and they help protagonists to meet and get to know each other (p. 61). These interactions and “personalised encounters” (p. 62) bring victims more fully into the criminal process and invite reflection by an offender about “how he can make good again” (p. 62). His ideas for a model court go further than others in suggesting how civil and criminal processes might be blended.

His proposed court is victim-centered and lay-oriented, and has four stages. The first is to establish that a law has been broken and the right person is identified. The second is to focus attention on the victim’s situation and what can be done to address it, “first and foremost by the offender” (p. 63), then the local neighborhood, and then the state. Christie has in mind repairing windows and locks, offenders paying compensation with money or by performing labor for a victim, and in other ways, “restoring the victim’s situation” (p. 64). After all of this occurs, the third stage is a judicial officer deciding if further punishment is required, “in addition to those unintended constructive sufferings the offender would go through in his restitutive actions [for] the victim” (p. 64). The last stage, which is post-sentence, is service to an offender. This would include addressing his or her social, medical, and educational needs.

Several observations can be drawn from the early works that are now linked to restorative justice. First, the authors all believe that conventional criminal justice is a failure, and they propose different models of criminal justice. Second, they argue that convicted defendants should have a more direct and constructive role in “repaying” victims for crime. This role is variably termed creative restitution, pure restitution, restorative justice, or restoring the victim’s situation. The authors refer to the consequences of this new offender role as restoration, making

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<sup>23</sup> See Bottoms (2003) for an analysis and critique of Christie’s romantic view of dispute resolution.

reparations, healing, among other terms; and they have different ideas about its impact on offenders. Eglash believed that the new role might change an offender in positive ways, whereas Christie did not expect or care if face-to-face meetings led to reductions in re-offending. Third, all the authors struggle in imagining how this new role for offenders relates to conventional criminal justice. For all (except perhaps Christie), there is a rejection of punishment and the “retributive paradigm,” and a desire to identify “non-punitive,” more constructive responses. Finally, for some (Zehr and Christie), there is also a new role for victims and others, who should be able to speak and participate in decisions about responding to crime.

### *B. Later Ideas*

Restorative justice became more complex from the mid 1990s onwards. By 1996, Braithwaite (1996, reprinted 2003, endnotes 9 to 29, pp. 94-95) could itemize over 20 books, articles, and conference papers having “restorative justice” in the title. As ideas and arguments were put forward, several types of criminal justice activities then in place (e.g., prisoner-victim reconciliation in North America, youth justice conferences in New Zealand and Australia, victim-offender mediation in North America and Europe) were being re-branded as “restorative justice.” Meanwhile, Braithwaite’s (1989) concept of “re-integrative shaming” (described in Part V) began to be applied in the early 1990s as the theory guiding “community conferencing” and then, restorative justice.<sup>24</sup> Community conferences are meetings between an admitted offender, victim, and their supporters and other relevant participants, guided by a facilitator (a police officer or other professional) with the aims of encouraging offender accountability, victim voice, mutual understanding, and group decision-making on fashioning an outcome.

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<sup>24</sup> See Daly (2001, pp. 63-65) for a summary of the serendipitous connection that was made between re-integrative shaming and New Zealand family group conferencing in 1990 by an Australian police officer, which was then applied to a *police-led* youth cautioning scheme in New South Wales in 1991, and subsequently to other Australian jurisdictions. Police-led conferencing, which was exported to North America and England in the mid 1990s, differs from what is termed “New Zealand style” conferencing, which is not facilitated by a police officer and does not rely exclusively or mainly on the theory of re-integrative shaming.

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

*1. Inconsistent Use of Key Terms.* Articles in an early edited collection by Galaway and Hudson (1996) exemplify what is and continues to be an inconsistent use of key terms. The contributing authors use the terms “reparation” and “restitution,” either together or separately, to refer to outcomes, typically financial or labor (e.g., community service), that may come from restorative justice (see, e.g., Jervis 1996; Lee 1996; Wemmers 1996). “Reconciliation” is rarely defined although it is often named as a goal of restorative justice. Contributors write from their own frames of reference as each attempts to understand and come to terms with the idea of restorative justice, and there is little reflection on the disparate use of terms. One exception is the last chapter by Harland (1996), who says the field should “define and clarify the most essential aims and related mechanisms, beginning with restoration itself [but also] reconciliation, reparation to the community, mediation ... and so on” (p. 507).

A significant theoretical contribution to the volume is Retzinger and Scheff (1996), who consider the social-psychological mechanisms in the community conferences they observed in Australia.<sup>25</sup> They distinguish “material” and “symbolic reparation” processes. The former leads to a specific outcome, what an offender agrees to do (or, as they say, “restitution or

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<sup>25</sup> We do not consider their analysis of “shame as a master emotion” (p. 318) and how this may (or may not) relate to re-integration. For them, community conferences were one site to observe their theorizations on shame, emotions, and micro interactions.

compensation for damage done, and some form of community service,” p. 316). This is the visible and “largely unambiguous” part of the process. Less visible and more complex is an ideal outcome of “symbolic reparation,” which has two steps in the “core sequence.” First, the offender “clearly expresses genuine shame and remorse over his/her actions,” and next, “in response, the victim takes a first step toward forgiving the offender for the trespass” (p. 316). This core sequence “generates repair and restoration of the bond between victim and offender [which was] severed by the offender’s crime” (p. 316). Further, they say that the repair of this bond (that is, between the dyad) “symbolizes a more extensive restoration that is to take place between the offender and other participants.” The core sequence may “only [be] a few seconds,” but it is “the key to reconciliation, victim satisfaction, and decreasing recidivism” (p. 316). Without the core sequence, they argue that the “path toward settlement is strewn with impediments” (p. 317). They view symbolic reparation as unique to community conferences compared to any other type of justice system response. Importantly, they discovered that symbolic reparation did not occur in the formal phase of *any* of the nine conferences they observed. This was because offenders did not “clearly express genuine shame and remorse” (p. 321). Such expression, or what may be termed a “sincere apology,” is “a difficult and delicate undertaking even when the transgression is minor” (Tavuchis 1991, p. 22), and this is further complicated by the presence of third parties, as occurs in the conference process (see Hayes 2006).

Strang (2001) also considers the “emotional dimensions” of victimization, emphasizing that victims see “emotional restoration as far more important than material or financial reparation” (p. 184; see also Strang 2002, p. 18).<sup>26</sup> Drawing on Marshall and Merry’s (1990) review, she says that “often what victims want most [is] not substantial reparation but rather symbolic reparation, primarily an apology” (Strang 2001, p. 185). In both publications, Strang

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<sup>26</sup> However, in Strang (2002, p. 18), the wording changes slightly: “victims see emotional *reconciliation* to be far more important than material or financial reparation” (emphasis added).

depicts the material forms of recompense with a plethora of terms (variably as restitution, material restitution, material restoration, material reparation, material compensation, substantial reparation, financial reparation), a not atypical pattern in the field. However, what may be queried is equating “symbolic reparation” with “an apology.” This is because Retzinger and Scheff (1996) point out that the core sequence involves not only an offender expressing genuine remorse, but also a readiness and ability of a victim to respond. In other words, “symbolic reparation” is not something a victim can “want.” Although an apology is the first step in the core sequence, a victim has an equally important role in deciding to acknowledge and respond to it. Further, as Retzinger and Scheff (1996, p. 317) suggest, symbolic reparation “depends entirely upon the play of emotions and social relationships during the conference.”<sup>27</sup>

By contrast, Duff (2002, pp. 84-85) defines restoration as the reinstatement of a victim to an “original favourable condition,” whereas “reparation and compensation ... make up for the loss of what cannot be restored ... and are the means to restoration.” He then asks, “what can repair the wrong that was done?” His answer, an apology, which includes elements of “recognition, repentance, and reconciliation” (p. 87). To give added “forceful expression” to an apology, Duff identifies the following as examples of “moral reparation: ... undertaking some service for the victim, buying a gift, contributing time or money to a charity” (p. 90).<sup>28</sup> Sharpe (2007, p. 29) picks up on Duff’s point, but refers to his cited examples of moral reparation as types of symbolic reparation (which she says, are sometimes also called partial restitution). Still other writers do not distinguish material and symbolic reparation. For example, while recognizing that victim-offender meetings aim to address “victims’ emotional needs as well as their material ones,” Marshall (1998, reprinted 2003, p. 32) itemizes the following simply as

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<sup>27</sup> Strang (2001) is principally interested to show the benefits of conferences over court processes for victims’ emotional restoration: apologies are more often given in conferences than in court, and victims’ emotional restoration (on various measures) is higher. Despite this, victims do distinguish between sincere and insincere apologies, as discussed in Part V.

<sup>28</sup> Both Duff (2002) and Sharpe (2007) are concerned with addressing the *wrong* of crime by an apology, whereas others such as Strang are concerned with addressing the “emotional harm” a victim may have suffered. The two are not the same.

forms of reparation: money payments, work for a victim or community case, undergoing counseling, or a combination of these. Zedner (1994, p. 238) discusses the material and symbolic (which she also terms “psychological”) forms of reparation, but notes that in practice, the differences between them are not clear-cut: “sums paid in compensation seldom approach the actual value of the loss suffered, and the significance of the payment may often be largely symbolic.”

This is but a small sampling from the literature to make a general point. Currently there is no authoritative glossary of terms to which people can refer when discussing reparation, restoration, restitution, and how these relate to restorative justice and its goals in domestic criminal justice settings.<sup>29</sup> People use different terms to refer to the same thing, or the same term to refer to different things. Optimistically, we may say that the restorative justice field is evolving and dynamic; more critically, that it is chaotic and incoherent. We suggest a way through the chaos at the end of this section.

Restoration, as a concept, faces another critique. Most people assume or claim that the goal of restorative justice is restoration or “to restore” a victim<sup>30</sup> (Walgrave 1995; Braithwaite 2002*b*, respectively). In other words, it is understood *literally* to mean a justice activity that aims to restore a person to their original position. Others suggest that restorative justice should be viewed as a *nominal concept*, standing for a set of justice activities; and it should not be narrowly construed as restoring people, property, or social relations (Curtis-Fawley and Daly 2005, p. 605). One reason for taking the latter view is that it addresses some critics, in particular, those who consider the appropriateness of restorative justice for gendered violence, who say that “the concept of restoration suggests that a prior state existed in which [a domestic violence] victim experienced significant liberty and the offender was integrated into the community

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<sup>29</sup> Dignan (2005, pp. 196-200) provides a glossary of terms, with reference mainly to England and Wales; it could be a good base to build a larger, more authoritative analysis of terms.

<sup>30</sup> Depending on the writer, the goal may also be restoration of an offender and “the community.” Zedner (1994, p. 235) suggests that the goal of reparative justice is “reintegration [of the offender] and restoration simultaneously.”

[when] neither may be true” (Coker 2002, p. 143; see also Cossins 2008 on child sexual abuse). Other critics say that the point is not restoration to a status quo or what existed before, but rather a transformation of social relations and society (Sullivan and Tifft 2005).<sup>31</sup>

2. *Conceptions, Definitions, and Agendas of Restorative Justice*. Johnstone and van Ness (2007a, p. 6) argue that restorative justice is not only a “persistently vague concept, it is in fact a deeply *contested* concept” (emphasis in original). There is no one definition, nor should this be expected because, they say, the character of the restorative justice movement is not coherent or unified. They identify three conceptions, although these can overlap in practice: *encounter* (a focus on the processes of face-to-face meetings and decision-making); *reparative* (a focus on outcomes that “repair the harm,” including those decided by criminal justice professionals); and *transformative* (a focus on transformations of self and society). Some writers emphasize the process; others the outcome; and still others focus on the *values* associated with it. Not surprisingly, the list of values varies, depending on the writer. For example, van Ness (2002, p. 11) identifies four values of encounter, amends, reintegration, and inclusion, which are then linked to a set of activities or outcomes that should be in a “fully restorative response.” Braithwaite (2002b) has a far more elaborated structure of 24 values (see below).

Johnstone (2008) identifies five agendas of restorative justice to distinguish the different political directions the field is taking. Agenda one, the most familiar, is concerned with changing the response to crime; two, with changing the way in which “crime” and “justice” are defined; three, with widening the uses of restorative justice to other organizational settings (e.g., schools, prisons, workplaces); four, with “projects of political reconciliation” (e.g., applications post-conflict societies, among others); and five, with transforming social organization and “personal lifestyle” (p. 72). Although these agendas may overlap and are themselves “internally

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<sup>31</sup> Braithwaite (2002b, p. 570) attempts to address this problem by adding a maximizing value of “providing support to develop human capabilities to the full” so that restorative justice is not “used to restore an unjust status quo.” The aspiration to transform, rather than to restore to a status quo, is at the heart of the Nairobi Declaration (2007) (see Couillard 2007, pp. 450-51).

complex,” the point is that people are seeking to achieve different aims under the rubric of restorative justice.

3. *Popular Uses and Mis-Uses.* An enduring problem for any new justice idea is truth in labeling. This occurred more than two decades ago when so-called reparation schemes were introduced in England. As Davis, Boucherat, and Watson (1988, p. 128) point out, these were “mis-described” because their main aims were not “reparative justice,” but diversion from court or mitigation of sentence. The authors were critical of these “half-baked” attempts “to promote ‘reparation’,” all of which were “disappointing.” We see the same problem today for restorative justice. It is often used to refer to any response to crime that does not involve a prison sentence or that is “non-punitive.” For instance, Pennsylvania sentencing guidelines identify “restorative sanction programs” as “least restrictive, non-confinement intermediate punishments” (section 303.12 (a) (5)). Roberts and Stalans (2004, pp. 325-26) contrast “punitive” and “restorative” sanctions, the latter including anything that is a community or non-custodial penalty. Aware of the “McDonaldization of justice” problem, when the label of restorative justice is wrongly applied to a justice activity, restorative justice proponents have created continua that identify practices ranging near and far from the restorative ideal (see, e.g., Umbreit 1999; McCold 2000; van Ness 2002).

4. *Restorative Justice Unleashed.* Reflecting, in part, the different agendas of restorative justice, two types of conceptual expansion have occurred. First, the well-known restorative justice advocate and theorist, John Braithwaite, has created a far larger, more encompassing project, based on a transformative agenda. His work evolved from more modest beginnings, applications to youth crime in the early and mid 1990s (e.g., Braithwaite and Daly 1994, Braithwaite 1996); but expanded at the turn of the twenty-first century to include broader mechanisms of regulation and societal transformation (Braithwaite 1999, 2002a, 2003). Indicative of his vision of “holistic restorative justice,” Braithwaite argues that it is not just about “reforming the criminal justice system, [but] a way of transforming our entire legal system, our

family lives, our conduct in the workplace, our practice of politics” (Braithwaite 2003, p. 1). He continues by saying that restorative justice is

about struggling against injustice in the most restorative way we can manage. ... It targets injustice reduction [not merely crime reduction]. It aspires to offer practical guidance on how we can lead the good life as democratic citizens by struggling against injustice. It says we must conduct that struggle while seeking to dissuade hasty resort to punitive rectification or other forms of stigmatising response (p. 1).

Like others, but in a more sophisticated fashion, Braithwaite (2002*b*) takes a values orientation to restorative justice. He identifies twenty-four values of three types: constraining (specifying rights and limits), maximizing (specifying sites and types of restoration), and emergent (properties such as remorse, apology, and forgiveness that emerge when restorative justice succeeds, but which cannot be expected to occur). The maximizing values include not only emotional restoration, but also restoration of human dignity, property loss, safety or health, damaged human relationships, communities, the environment, freedom, compassion or caring, peace, and sense of duty as a citizen. This list is more extensive than any other in the field today, which normally includes restoration of property loss, of damaged human relations, and a victim’s emotional restoration. Braithwaite’s vision for restorative justice is a “radical redesign of legal institutions” and “regulating injustice restoratively” (Braithwaite 2003, pp. 18-19).

Conceptual expansion takes another form. Some commentators use restorative justice as *the single term* to encapsulate emergent, and quite varied, justice forms and practices. This is exemplified in a review essay by Menkel-Meadow (2007), in which restorative justice is used as an umbrella concept to refer not only to mediated meetings between victims and offenders (and others), but also to contemporary forms of Indigenous sentencing practices and problem-solving courts (e.g., drug courts). She also claims that restorative justice “helped form a new field of international law and political structure: transitional justice” (p. 164). How did it come to be that varied and disparate justice activities have been categorized as types of “restorative justice?”

Menkel-Meadow begins by saying that practices associated with restorative justice ideally have “four R’s [of] repair, restore, reconcile, and reintegrate” (p. 162). Later she says that these elements are seen in problem-solving courts, which use “restorative principles,” “more reparative sentences” (p. 168), and are “specialized reparative courts” (p. 177). This is inaccurate. There are some affinities between restorative justice, Indigenous sentencing courts, and therapeutic jurisprudence (the last being associated with problem-solving courts). However, they are distinctive; and merging them as one type of justice creates confusion and incoherence (see, e.g., Daly, Hayes, and Marchetti 2006; Marchetti and Daly 2007). Likewise, as we shall see below, truth commissions are just one activity in a transitional justice process; some, but not all truth commissions adopt approaches that have restorative justice elements. It is inaccurate to say that transitional justice was formed from restorative justice principles, as Menkel-Meadow suggests (2007, p. 164). Better to use “innovative justice” as the umbrella concept,<sup>32</sup> within which a variety of justice activities, with different aims, practices, and socio-political contexts, can be documented and understood. Why, then, do some commentators use restorative justice as an umbrella concept? It may stem from a lack of familiarity about the justice practices themselves, or it may reflect a desire to generate enthusiasm that something large and important is happening.

### *C. Cutting through the Chaos?*

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

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<sup>32</sup> Some authors (e.g., King et al. 2009) use the term “non-adversarial justice” as the umbrella concept to include restorative justice, therapeutic jurisprudence, alternative dispute resolution, problem-oriented courts, Indigenous sentencing courts, preventive law, holistic approaches to law, among other areas.

For Sharpe (2007), *reparation* is the master term, within which there is material reparation and symbolic reparation, which may overlap. Material reparation generally addresses “the *specific harms* ... while symbolic reparation speaks to the *wrongness of the act*” (p. 27, emphasis added). The former includes restitution (the broader term referring to return of property whether by payment or by service) and compensation (monetary payment in lieu of return or repair of property, or acknowledging a “fundamental loss”). Symbolic reparation refers mainly to an apology, but as Sharpe understands the term, it is also “expressed” by buying a gift, doing community service, or entering a treatment program. Others such as Marshall (1998) use reparation as the master concept, but without drawing distinctions among terms such as compensation or community service.

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

*Making amends* is the master term for von Hirsch, Ashworth, and Shearing (2003), who focus on a “negotiated process between offender and victim” (also termed a “moral dialogue”), which leads to the offender’s “acknowledgment of fault and the undertaking of a reparative task” (p. 26). The reparative task should recognize the victim’s status as a wronged individual and express a “regretful stance” (p. 32). The model assumes an *imposition* on an offender, which includes “adverse judgments” and loss of property or time by paying compensation or undertaking a task. An amends model is also used by van Ness and Strong (2006), but they focus on the harm caused by crime, more so than a victim’s status as a wronged individual.

Dignan (2003) uses a combination of master terms in identifying restorative justice as a “replacement discourse” in his systemic model of criminal justice, conceptualized as an enforcement pyramid, building on Braithwaite (1999). At the base are minor property or assault offenses, and their handling is similar to von Hirsh, Ashworth, and Shearing’s (2003) making amends model: reparative undertakings are agreed to in an informal restorative justice process, which demonstrate “respect for the rights of others.” The next level in the pyramid are cases that go to court because victims do not want to participate, suspects deny guilt, and the parties cannot agree on reparation outcomes. Court sentencing would be limited to imposing a “restoration order” (p. 147), which may be compensation, reparation for the victim, or community service. The next two levels up the pyramid involve more serious cases and repeat offenders; these would attract court sentences of “restorative” punishment, and ultimately, incapacitation.<sup>33</sup>

Identifying these conceptual starting points is one way to cut through the chaos. However, there remain profound problems in establishing an agreed-upon set of aims and mechanisms of restorative justice: the field lacks definitional discipline, and analysts are divided over whether and in what ways retribution and punishment should have a role in restorative practices.

#### IV. Selected Applications of Reparation, Restoration, and Restorative Justice

We provide a sampling of applications of these ideas in international and domestic criminal justice contexts. Edited collections by Sullivan and Tifft (2006) and Johnstone and van Ness (2007*b*) contain articles and examples that are relevant here and in Part V.

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<sup>33</sup> This model builds on Cavadino and Dignan’s (1997, p. 248, fn 1) earlier work where they contrast two meanings of reparation: in a narrow sense, it refers to offenders making amends to individual victims (with “restitution as a near synonym”); but in a wider sense, it refers to measures that “recompense the community as a whole” (including community service or paying fines), with “restoration” as the term closest in meaning. This distinction in the meanings of reparation does not appear in Dignan’s (2005) glossary of terms, however.

### *A. Reparation and Restoration in International Criminal Law and Justice*

Reparation, restoration, and restorative justice are terms used in transitional justice and international criminal justice. Here is a brief review of how they are understood and used.

*1. Transitional Justice.* Transitional justice is “a framework for confronting past abuse as a component of a major political transformation” (Bickford, *Encyclopedia of Genocide and Crimes against Humanity* 2004, p.1045). It is not a type of justice, but rather a *context* of justice for societies undergoing transformation, which may occur quickly or take many decades. From the International Center for Transitional Justice (hereafter termed the ICTJ) (2008, p.1), transitional justice “emerged in the late 1980s and early 1990s, mainly in response to political change in Latin America and Eastern Europe and to demands in these regions for justice.” At the time, commentators argued that a state’s uses of violence and terror toward citizens had to be addressed, but without undermining the potential for a state to shift to democracy. Such shifts were initially termed “transitions to democracy,” but in time the field was called “transitional justice” (ICTJ 2008, p.1). Its legal basis is, in part, an Inter-American Court of Human Rights decision in 1988, stipulating that states had “four fundamental obligations in the area of human rights: ... to prevent human rights violations, to conduct ... investigations of [them], to impose sanctions on those responsible ..., and to ensure reparation for the victims” (ICTJ 2008, p.1).

ICTJ says a “holistic approach” (p. 2) is necessary. The complexity and scale of abuse and victimization, coupled with the costs of legal redress and the likelihood of continuing political and judicial corruption, render standard approaches of prosecution and trial not feasible or practical. Further, there are pressing needs to re-introduce social organization and cohesion in a society, which could be thwarted by prosecution alone. Thus, a variety of approaches is recommended. In addition to criminal prosecutions, these include truth commissions, reparation programs, changes to a state’s security system (including the police, military, and judiciary), and memorial activities. Starting about 2005, scholars and activists began to systematically consider women and gender differences in transitional justice. They identified the gender specificity of

victimization, urged greater awareness of women as victims, and called for appropriate mechanisms of redress for women (Rubio-Marín 2006, 2009; Bell and O'Rourke 2007; Couillard 2007; Rubio- Marín and de Greiff 2007).

2. *Truth Commissions*. Truth commissions are one mechanism of transitional justice, although they have also been used to address political conflicts in countries at peace (e.g., the Greensboro Truth and Reconciliation Commission in the United States, 2004-06).<sup>34</sup> Brahm (2004) says that of 27 commissions established since 1974, one sees diverse goals, ways of operating, and outcomes. He suggests that one claimed benefit of truth commissions is “delivering ... restorative justice,” which he defines as “trauma healing [and] ... restor[ing] dignity to victims” (p. 6). This may result from victims telling their story of what occurred and listening to the accounts of perpetrators and other victims. He notes, however, that these “therapeutic benefits” have not been established empirically. Likewise, Erin Daly (2008, p. 24) suggests that “insufficient attention has been paid to the hazards of truth-seeking and truth-revealing.”

How did restorative justice come to be linked to truth commissions? The connection was first made when (then) Archbishop Desmond Tutu framed the establishment of South Africa's Truth and Reconciliation Commission in 1995 (hereafter termed the TRC). As Chairperson of the Commission, Tutu (1999) embraced the idea of restorative justice, associating it with traditional African jurisprudence (*ubuntu*) and reconciliation. He said that rather than having mass prosecutions for state violence and human rights abuses that had occurred under the apartheid regime, the decision taken was to use a restorative approach. The framing of the 1995 TRC legislation drew a contrast between restorative justice and vengeance (the latter associated with retributive justice): “there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* [humanity to others] but not for

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<sup>34</sup> This truth commission examined events in November 1979 in Greensboro, North Carolina, when five African-American protesters were killed in a union demonstration; all of those accused were acquitted (see Brown et al. 2006; Androff 2008).

victimization” (cited in Roche 2007, p. 78). As Roche points out, this false opposition between the restorative (“African”) and a vengeance-defined retributive (“Western”) justice left little role for formal prosecution and punishment; and as Wilson (2001, p. 11) says, there was no “space to discuss fully the middle position: the pursuit of legal retribution as a possible route to reconciliation itself.”

We cannot examine the TRC in any depth. Rather, we make several observations on how international legal analysts have come to associate its practices with restorative justice. Minow (1998, p. 91) suggests that the focus of the TRC “moved away from prosecutions toward an ideal of restorative justice,” which, she says

... seeks to repair the injustice, to make up for it, and to effect corrective changes. ...

Offenders have responsibility in the resolution. The harmful act, rather than the offender, is to be renounced. Repentance and forgiveness are encouraged (p. 91).

She believes that this ideal is “unlike punishment, which imposes a penalty or injury for a violation,” and is unlike “retributive approaches, which may reinforce anger. ... The TRC emphasizes truth-telling, public acknowledgment, and actual reparations as crucial elements for restoration of justice and community” (pp. 91-92). Thus, Minow’s early and widely-cited work recapitulates the contrast between “restorative justice” and “retributive approaches,” creating a false opposition, as noted by Roche and Wilson above. This is a typical practice in the international criminal justice and transitional justice literatures, as analysts have selectively adopted ideas from the restorative justice field. In general, and except for Combs (2007), restorative justice is used to refer to a parallel set of justice activities, with different aims and purposes than conventional mechanisms of prosecution and trial.

*3. Other Reparation Mechanisms.* In addition to truth commissions, other reparation mechanisms are used, although they are typically not termed restorative justice. de Greiff (2006a) summarizes eleven cases in the post World War II period: four, in post-war contexts; six, in post-conflict societies; and one, in the aftermath of the September 11 attacks in the United

States. In most contexts, individual victims were political prisoners and torture victims. Forms of reparation were made through legislative measures, truth commission recommendations, treaties, and the establishment of national and United Nations bodies to allocate funds to claimants. Among the types of reparation were restitution (e.g., reinstating citizenship and being released from wrongful detention), compensation (e.g., money and pensions), rehabilitation (e.g., education support and health assistance), and satisfaction (e.g., identifying the remains of family members and creating sites of memory).

Reparation can also be established in less formalized ways by, for example, community groups. Nikolic-Ristanovic (2005) identifies community-based initiatives (which she calls restorative justice) in the former Yugoslavia, such as “story-telling workshops, days of reflection, and permanent living memorial museums” (p. 280), which were developed and carried out because most war-related sexual violence in the region was not addressed by any legal system.

4. *Restorative Justice in International Criminal Justice.* One novel approach extends upon the idea of truth commissions. It recognizes that efforts to bring to trial all (or even many) of those accused of war-related crime are impossible and prohibitively expensive. Combs (2007) proposes an aggressive policy of plea bargaining, carried out with a credible threat of prosecution, along with the “restorative justice guilty plea,” which contains elements that make the guilty plea hearing more meaningful. These include truth telling by a defendant, describing what was done in detail; and victim participation, including voicing the impact of crimes and asking questions (e.g., about the location of bodies).

*B. Restorative Justice in Domestic Criminal Justice and in Addressing Wider Political Conflict*

In domestic criminal justice, the most frequent form that restorative justice takes is facilitated meetings between victims, offenders, and others. These occur only after an admission or plea, and they are termed victim-offender mediation and conferencing. The differences

between the two are not as sharp as they once were (when mediation referred to just a victim and offender meeting), and some countries may use the terms mediation or conferencing to refer to similar processes.

1. *Victim-Offender Mediation.* Victim-offender mediation (VOM)<sup>35</sup> is the term frequently used in North America, England and Wales, and European countries to refer to post-plea meetings between adult offenders and victims, facilitated by a trained person. These can occur at different stages of the criminal process, with different sources of referral, and they may be run by volunteer groups or state agencies. The general idea is that there is an exchange of information and expression of feelings between the protagonists, and an outcome determined. Early texts include Marshall and Merry (1990) and Davis (1992) on reparation and mediation in England and Wales, and Umbreit (1994) on mediation in the United States.

2. *Youth Justice Conferences.* These began in 1989 with family group conferences in New Zealand, and from the early 1990s onward, community conferences, and then youth justice conferences in Australia. The police-led conferencing model was exported to North America and England in the mid 1990s. Compared to earlier forms of victim-offender mediation, conferences normally have a larger number of participants, and in New Zealand and Australia, they are statutorily based. The aim is for offenders, victims, their supporters, and other relevant people to discuss the offense and its impact, and to consider a suitable undertaking or outcome. They are typically used as diversion from court, but are also used as pre-sentence advice, depending on the jurisdiction. Key empirical works include Maxwell and Morris (1993) for New Zealand; Strang et al. (1999) and Strang (2002) on the Re-Integrative Shaming Experiments (RISE) in Canberra; Daly (2001, 2002, 2003) on the South Australia Juvenile Justice Conferencing; and Hoyle, Young, and Hill (2002) on Thames Valley restorative cautioning.

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<sup>35</sup> Victim-Offender Reconciliation Projects (VORPs), first used in North America in the mid 1970s, preceded VOMs. As the idea expanded from its Mennonite religious base, van Ness and Strong (2006, p. 28) say that the “terms ‘mediation’ or ‘dialogue’ [were used] instead of ‘reconciliation’ because ... the latter term sounded too religious.”

3. *Adult Pre-Sentence Conferences.* Compared to VOMs, conferences are less frequently used in adult cases. Pre-sentence (post-plea) adult conferencing was introduced in four New Zealand jurisdictions in 2001 (Morris et al. 2005), expanding to a wider number of jurisdictions in 2005. Pre-sentence conferencing was also introduced in England in several jurisdictions during the early 2000s with RISE-UK (Sherman et al. 2005; see also Shapland et al. 2007). In both jurisdictions, cases do not go forward unless victims first agree to participate, and then offenders. The London site for RISE-UK utilizes an experimental design, in which cases are randomly assigned to a conference (or not). In both jurisdictions, the conference is viewed as supplemental or providing advice to the sentencing: a report describing the conference and outcome is provided to the sentencing judge, who may take into account what occurred in fashioning a sentence.

4. *Post-Sentence and Prison Pre-Release.* The uses of restorative justice, broadly defined, in prison contexts varies greatly (see Liebmann and Braithwaite 1999 for an inventory). van Ness (2005) sketches five applications, ordered from least to most ambitious. First, is developing prisoner awareness and empathy, using educational projects; second is identifying the mechanisms by which prisoners can make amends to victims or communities (including monetary recompense or community service); third, is facilitated dialogue between prisoners, family members, and victims; fourth, is developing ties between prisoners and those who live in the surrounding area; and fifth, is addressing conflicts in prison (among prisoners, among staff and management, and between both groups). As we might expect, compared to youth and adult conferencing, more serious offenses are addressed in facilitated dialogue between prisoners and others. Umbreit et al. (2003) describe serious violence cases (mainly homicide, but also rape and robbery) with prisoners, family members, and victims in Texas and Ohio; and Gustafson (2005) review similar developments that began in British Columbia in the late 1980s, but have since expanded throughout other Canadian provinces. In many prison-based contexts of restorative justice, the activity is carried out by voluntary groups and is outside criminal justice. For

example, facilitated dialogue (application three above) is not supposed to have any bearing on parole decisions.

5. *Wider Political Conflict.* Restorative justice processes are used to address wider political conflicts, which, depending on the writer or specific case, may also be viewed as an instance of transitional justice. Community-based restorative justice was introduced in 1997 to address Republican and Loyalist paramilitary violence in Northern Ireland and to facilitate the peace process (McEvoy and Mika 2002). Disputes involved individuals, families, and groups of households; they included both anti-social behavior and crime, ranging from relatively minor matters (property damage or noise) to more severe (paramilitary threat). If shuttling between disputants did not address a problem, a mediation or conference was held.

Restorative justice forums have been used to address various manifestations of hate crime in the United States (see Coates, Umbreit, and Vos 2006). The authors present case studies of racial conflict in a school and community, the impact of the murder of a transgendered Navajo youth, and the impact of threats made to an Islamic Cultural Center after the September 11 attacks. Each case has a unique configuration of elements, but they typically involve large community meetings, where protagonists discuss and address offenses committed, fears about safety, and sources of animosity and prejudice, as initial steps toward developing more cohesive relations.

## V. Theories Related to Reparation, Restoration, and Restorative Justice

In domestic and international criminal justice settings, reparation, restoration, and restorative justice contain new roles for victims, offenders, and other participants; and new ideas about what should occur. These center on a more informal, dialogic process, although one circumscribed by law and legal limits; rights of participation to speak and contribute to decisions on outcomes by victims, offenders, and relevant others; processes that provide openings for offender remorse and victim validation; and sanctions that are linked in a meaningful way to offenses. We consider a

small set of theories, those focusing on social interaction and behavior, mainly in domestic criminal justice contexts. However, there are many normative theories and legal arguments, including Braithwaite and Pettit (1992), Duff (2001), Hudson (2003) for domestic criminal justice settings; and Tomuschat (2002), Verdeja (2006), and Magarrell (2009) for international settings. We point to empirical work associated with the theories, but space limitations preclude a distillation of empirical findings.

#### *A. Reintegrative Shaming*

Braithwaite introduced the term reintegrative shaming in 1989, and he refined it further as conferencing developed in the Antipodes (Braithwaite and Daly 1994; Braithwaite and Mugford 1994; Braithwaite 1995, 1996). The key elements are encapsulated in his 1995 publication, from which we draw. Shaming (defined as “all social processes of expressing disapproval that have the intention or the effect of involving remorse in the person being shamed or condemnation by others,” p. 191) is a more effective deterrent to crime than formal punishment. It accomplishes “moral education” about what is right and wrong, setting in motion processes of both self and social disapproval; and it involves active citizen discussion and participation in disapproving certain acts. There are two types of shaming: stigmatizing and reintegrative. The former communicates disrespectful disapproval, humiliation, labeling both the person and the deed as bad, and “ceremonies to certify deviance” only. The latter communicates respectful disapproval, labeling the person as good but the act as bad, and “ceremonies to certify deviance” followed by those that decertify it (p. 194). Braithwaite argues that community conferencing (as practiced in New Zealand and Australia with large numbers of people), rather than victim-offender mediation (as normally having just a facilitator and victim-offender dyad), exemplifies a “micro form of communitarianism” (p. 198), which structures both shame and reintegration into the justice activity. Although his theory has mainly been applied in studies of

re-offending, Braithwaite argues that the process has a “victim-centered agenda that conduces to a sequence of confrontation-remorse-apology-forgiveness-help” (p. 199).

Braithwaite’s re-integrative shaming contains ideas that had been developing for some time: a preference for informal processes, where “citizens talk about crime” (p. 192) and professionals are sidelined, and outcomes involve “the payment of restitution” (p. 199). However, Braithwaite’s theory caught on rapidly because “shaming” and “re-integration” had great popular appeal, and the theory was amenable to studies of re-offending. Hayes (2005, 2007) provides a review of the re-offending literature; and Dignan (2005, pp. 102-3, 116-18), an analysis of re-integrative shaming.

### *B. Procedural Justice*

As developed by Tyler (1990, 2006 2<sup>nd</sup> edition), procedural justice aimed to de-couple citizens’ assessments of procedural fairness from the favorability (or not) of outcomes received. Contrary to caricatured versions of a more complex argument, Tyler did not say that outcomes did not matter, nor that process was more important than outcomes. Rather, he said that procedural fairness (termed process control) and outcome favorability (termed outcome control) were “distinct, but not independent” (p. 92). The “markers” of process control are trust (an authority is benevolent or caring), neutrality, voice (being able to state one’s case), and standing (being treated with dignity and respect). Tyler (1990) noted that because informal legal procedures had more opportunities for citizen participation and allowed a greater degree of decision-maker flexibility, they “may correspond more closely than trials to people’s intuitions about what is a fair procedure” (p. 155).<sup>36</sup> And why do citizens’ judgments matter? If procedures are judged to be fair, this reinforces a view that authorities are legitimate; and such legitimacy “promotes compliance with the law” (p. 170). Tyler’s ideas were explicitly featured

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<sup>36</sup> It is odd that he chose the term “trial” here; his Chicago study surveyed people by phone, asking them about their experiences with the police and courts; for the latter, it appears that most surveyed experiences were not of criminal matters (see p. 89), but Tyler is not explicit on this point.

in early research on restorative justice and conferencing in Australia (see, e.g., Daly et al. 1998, 2001; Strang et al. 1999), which focused on participants' perceptions of the fairness of the process and outcome, whether there were higher levels of perceived procedural justice in conference than court settings, and whether the conference experience generated increased levels of legitimacy and respect toward the police, law, and courts. Selected findings are available in Strang et al. (1999) and Daly (2001). One finding from Daly (2001) that is relevant to the next section is very high levels of procedural fairness are registered by offenders, and to a lesser degree victims, but there is relatively less evidence of "restorativeness" (defined as positive movement or mutual understanding of victims, offenders, or supporters) during the conference process.

### *C. Remorse, Contrition, and Apology*

All analysts recognize the unique capacity of informal justice processes to provide openings for the expression of an offender's remorse, contrition, and sincere apology. If perceived as sincere or genuine by a victim, there is potential for accepting the apology and/or forgiving an offender. With some exceptions (e.g., Retzinger and Scheff 1996; Bottoms 2003; Daly 2003; Hayes 2006; Dignan 2007), few in the restorative justice field have called attention to the fragile quality of the apology process and why sincere apologies are difficult to achieve. Tavuchis' (1991) comprehensive sociological analysis of apology and reconciliation shows why. An apology "consists of a genuine display of regret and sorrow," and "in its purest expression, ... [it] clearly announces that 'I have no excuses for what I did or did not do or say. I am sorry and regretful. I care. Forgive me'" (p. 19). Following the apology itself is the "response of the injured party: whether to accept ... by forgiving, to refuse and reject the offender, or to acknowledge [but defer] a decision" (p. 23). If all of this is carried off successfully, an apology "is a decisive moment in a complex restorative project" (p. 45), although "there are ... overwhelming odds against its success" (p. 46). Many things get in the way of success, but two

are important in a criminal justice context: offenders may offer “accounts” (explanations or excuses) rather than apologies, and the presence of third parties, who introduce new, potentially negative dynamics in what is optimally a dyadic, private activity (Tavuchis 1991). For these reasons, it is not surprising to learn that the “core sequence” of apology and steps toward forgiveness was not observed by Retzinger and Scheff (1996) in the youth justice conferences they observed, and that just 27 percent and 41 percent, respectively, of victims interviewed in the South Australia Juvenile Justice (SAJJ) and RISE projects believed an offender’s apology was sincere (Daly 2006, p. 139-40; see also Hayes 2006).

#### *D. Theories Regarding Victims*

Some authors call attention to the claimed, but poorly theorized or empirically demonstrated, benefits of informal justice processes for victims. Questions are rightly raised about the superficiality of “satisfaction” as a measure of victims’ judgments of their involvement, and more generally, of the lack of using relevant psychological theories in assessing the ability of victims to recover from crime (Pemberton, Winkel, and Groenhuijsen 2007, p. 4). Critiques are rightly lodged of the “profoundly ambivalent .... attitudes toward victims” evident in the theories underpinning restorative justice (Dignan 2007, p. 312; see also Dignan 2005, ch. 4). Several types of theoretical arguments are now emerging. Pemberton, Winkel, and Groenhuijsen (2007) consider psychological theories related to anxiety (control and attributions of the causes of victimization) and anger (rumination, forgiveness, and apologies); they call for more careful attention to the “intra-psychic” dimensions to victims’ experiences in restorative justice and how this varies, depending on the severity of offenses to victims. In addition to Tavuchis (1991) on apologies, Dignan (2007, pp. 314-16) identifies “narrative theory,” with its emphasis on story telling and the ability to reframe events, and cognitive behavioral theory, which may “neutralize trauma” and “desensitize victims to the emotional

trauma” caused by an offense.<sup>37</sup> In understanding the specific experiences of domestic and sexual violence victims, Herman (2005) emphasizes their need for validation, vindication, and integration, not from an offender, but from “the community,” saying that victims seek “the restoration of their own honor and the re-establishment of their own connections with the community” (p. 585). She challenges the offender-centered assumptions of reintegrative shaming, which are more relevant for nonviolent property crime than domestic and sexual violence, by suggesting that “the person who needs to be welcomed back into the community, first and foremost, is the victim” (p. 598). All those who are concerned with victims’ experiences raise questions about the value of apologies, how they are made and received, and the potential for revictimization when apologies are insincere.

## VI. Conclusion

Reparation and restoration emerged as criminal justice aims in the last half century, mushrooming to global prominence during the 1990s in domestic and international criminal justice settings. Many people, who are working in varied academic disciplines and analyzing crime in developed, developing, and post-conflict societies, have been inspired to reflect upon, critique, and conduct research on how these terms relate to the ideal and actual practices of “doing justice.” The newness of the ideas and excitement they have generated, the large numbers of people involved, the range of disciplinary and practice contexts, and movement across domestic and international criminal justice contexts—all of this has contributed to a huge field of knowledge that is not easily depicted.

In general, international criminal justice bifurcates “justice” and “reparation.” The former centers on modes of adjudicating and punishing offenders, and the latter, on modes of redress for victims, typically as collectivities. In international contexts, reparation is also

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<sup>37</sup> Dignan (2007) briefly considers Collins’ (2004) analysis of restorative justice as “interaction ritual.” However, when reading the single paragraph that Collins devotes to restorative justice (p. 111) in a book of over four-hundred pages, we find that he has a misinformed view of the routine practices of restorative justice: he assumes a highly romanticized and atypical “nirvana story” (Daly 2002).

concerned with state building and developing new citizen-state relationships. By comparison, when restorative justice was introduced in domestic settings, many believed that it offered an alternative to standard modes of punishing offenders, with its objectives of restoration and reparation. (It is important to remember that restorative justice has no mechanism of adjudication.) What “restoration” and “reparative outcomes” for an individual offender and victim would actually mean in a criminal justice activity was (and is) less clear.

In domestic contexts, some argue that censure and punishment are integral to restoration and reparation, whereas others say that restoration or reparation are “non-punitive” or “non-punishment” responses. Thus, there is a significant divide between those who wish to build a new model of criminal justice that retains retribution and punishment, but in a new form (e.g., Duff 2001, 2003; Dignan 2003); and those who eschew these ideas and advocate a new type of legal and justice order that is built primarily on restorative values (e.g., Braithwaite 2003). This schism will not go away any time soon because it is profoundly political and ideological.

Those new to the field face significant hurdles in grasping key concepts, which are defined differently, depending on the author. The restorative justice field would have greater presence and stature with more definitional discipline. At a minimum, it would help to have one set of definitions for restitution, compensation, reparative outcomes, symbolic reparation, among many other terms. Although it may not be possible to fully define restorative justice (not unlike the problems that philosophers have had in discussing retribution as a theory of punishment), a glossary of key terms, which explicates and harmonizes the different ways they have been used, would be a good start. It is also important to move beyond the simple oppositional contrast of retributive and restorative justice. Although as Roche (2007, p. 87) suggests, it served its purpose as a “catchy exposition” in the early years, it now confuses more than enlightens.

Despite the ideological differences and definitional problems, it is possible to describe what sets restorative justice, and associated ideas of reparation and restoration, apart from other theories or practices of criminal justice in domestic settings. The distinctive elements are a dual

focus on victims and offenders as active participants and subjects of justice mechanisms; and an interest to address crime directly by the actions, words, or burdens imposed on offenders directly to victims, and where relevant, to a wider social group. No other criminal justice theory has an explicit place for victims, nor an emphasis on interactions between them, admitted offenders, and relevant others in coming to terms with crime. Formal legality has an important role in checking informal processes like restorative justice (Braithwaite 1996), holding decision-makers accountable (Roche 2003), and striking a balance between victim and offender interests, which are often in conflict (Dignan 2005, pp. 179-87). A significant challenge, however, lies with “ordinary citizens,” upon whom the “whole operation” of criminal justice has long relied (Lacey 1994, p. 8). We are called upon to play an even greater role in criminal justice, with more generous, empathetic, and supportive orientations; and abilities to engage with others, to speak and listen well, and to negotiate novel and meaningful outcomes. Ideally, our orientations, words, and ideas are to have as much or more weight than those of legal actors in “doing justice.”

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Table 1. Conventional and Creative Restitution (from Eglash 1957-58a)

Element	Conventional restitution	Creative restitution
Restitution defined	Synonym for reparations or indemnity	Distinguished from reparations or indemnity
Four elements compared	Financial obligation Extent is limited Court-determined	Constructive act Creative and unlimited Guided, self-determined behavior
Relationship of restitution to punishment	Individual act Individual pays debt to society: financial only Determined by legal officials, "first mile" is punishment Individual only: "in punishment, a man stands alone"	Can have a group basis Individual carries out "constructive, redeeming act" to the victim or others Offender participates, goes a "second mile" beyond what the court requires or others expect Group of offenders can discuss and participate in restitutorial acts