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**Restorative Justice in Theory:
Addressing the Shortcomings of Retributive Justice and
Undermining the Rights-Based Critique of Restorative Justice**

Adam Hunsberger

Abstract

In the following pages, restorative justice is discussed in both theoretical and practical terms. The difficulties inherent to defining restorative justice are discussed and the United Nations' definition is accepted for the following analysis. A rights-based criticism of restorative justice is outlined and revealed as a weak counterargument when considered. The value of several restorative justice processes, namely truth commissions and family/community circles, are demonstrated to be useful forms of creating justice and improving communal relationships after an offense. Ultimately, restorative justice processes are revealed as having the potential to contribute to Western justice systems and to remedy the shortcomings of retributive justice.

Forgiveness...is an act that joins moral truth, forbearance, empathy, and commitment to repair a fractured human relation. Such a combination calls for a collective turning from the past that neither ignores past evil nor excuses it, that neither overlooks justice nor reduces justice to revenge, that insists on the humanity of enemies even in their commission of dehumanizing deeds, and that values the justice that

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restores political community above the justice that destroys it.¹

The above quotation was taken from Donald Shriver's *An Ethic for Enemies*. In the opinion of this essay's author, Shriver's words, though speaking specifically of forgiveness of one's enemies, appropriately establish the lens through which the following analysis of restorative justice theory should be viewed—despite the fact that forgiveness itself is not necessarily a goal of restorative justice. Present in the above quotation are various themes and values inherent to any restorative justice process: truth, forbearance, responsibility, respect for all involved, and the necessity of a collective will to restore, to the extent possible, the relationships harmed by an offense—committed by an individual against another individual or group of individuals—to a mutually amicable status.

In North America and much of the Western World, the manner in which our institutions establish justice is characteristically retributive. They are offender-focused. They view crimes as violations of state law, rather than as against victims. Justice is exacted punitively: a sentence is forced upon a defender that is intended to punish the offender, rather than to right the wrongs created by the offense. However, as A. Verne McArthur argues in his book, *Coming Out Cold: Community Reentry from a State Reformatory*, in which he focuses on the shortcomings of reform efforts in a retributive justice system, crime and delinquency are symptomatic of greater societal failures and disorganization at a community level as well as at an individual level.² He writes that justice must be reorganized as a means to an end—that end being the building or rebuilding of relationships between offender, victim, and their community. Restorative justice, and the principles and values by which it is guided, exists as a theoretical, and indeed practical, means of addressing the shortcomings of a retributive justice system.

¹ Trudy Govier, *Forgiveness and Revenge* (London: Routledge, 2002), 80.

² A. Verne McArthur, *Coming Out Cold: Community Reentry from a State Reformatory* (Lexington, Massachusetts: Lexington Books, 1974), 3.

In the following pages, I discuss restorative justice in both theoretical and practical contexts. I begin by defining restorative justice and outlining the principles and values by which it is guided, and the objectives that it aims to achieve. I demonstrate that restorative justice is far from a novel idea, but rather has been present for some time in many indigenous cultures around the world. Restorative justice will be discussed in comparison to retributive justice, in order to reveal both its strengths and weaknesses as a model for justice in a modern setting. Ultimately, it will be argued that restorative justice, as it aims to establish or reestablish harmony following a situation where an offense, minor or major, is given, exists as an appropriate framework for addressing the shortcomings of retributive justice models. Processes and mechanisms of restorative justice, and specific cases in which they were used, are discussed in order to demonstrate that restorative justice is a valuable and practical model for justice.

We must begin by determining a definition of restorative justice. Howard Zehr notes that a consensus has yet to be reached regarding such a definition, even among scholars whose primary field of research is restorative justice.³ Further, Amy Levad argues that three problems arise in any attempt to define restorative justice. First, the programs, to be discussed in greater detail below, which can be encompassed by the label of restorative justice are extensive and diverse, making the definitional process more complex. Second, the development of these programs in North America, especially the United States, has occurred in tandem with a rise in punitive approaches to sentencing. This has forced restorative programs to adopt more punitive elements, and, therefore, has contributed to a distortion of what truly constitutes restorative justice. Last, restorative justice has been popularized in recent decades alongside other reformative efforts. Transformative justice, for example, also seeks to reform the current retributive model. Levad argues that this competition between different models of justice, which possess

³ Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002), 36.

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similar elements—each seek to correct underlying inequalities in society—has led many to view them as identical or overlapping. This, too, hinders the consensus-building process concerning a definition of restorative justice.⁴

In order to overcome this hindrance, it is useful to define restorative justice in theoretical terms, with consultation of multiple sources. For the purpose of this essay, such a definition must, at the least, outline the parties involved in restorative justice processes, consider the values upon which restorative justice is based, and also go beyond what restorative justice is to describe what restorative justice is not. The definition of restorative justice utilized in this essay will, therefore, be defined both positively and negatively.

Levad is critical of the following definition, offered by Zehr: “a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”⁵ This definition does well to outline the necessity of involving the impacted parties, as well as to include that the goal of the process is to amend the harms of the offense. However, Levad argues that Zehr’s definition fails to place limits on the solutions that arise from restorative justice processes. She notes that these processes can result in wholly retributive outcomes and that any definition of restorative justice should place limits on the outcomes as much as on the processes. In place of Zehr’s definition, Levad adopts the definition set out by Gordon Bazemore and Lode Walgrave: “every action that is primarily oriented to doing justice by repairing the harm that has been caused by a crime.”⁶ This definition, however, is problematic due to its broadness and does little to address the difficulties with defining restorative justice which she outlines and are listed above. Though her criticism is correct, she accepts an alternative definition that allows for too much interpretation.

⁴ Amy Levad, *Restorative Justice: Theories and Practices of Moral Imagination* (El Paso: LFB Scholarly Publishing LLC, 2012), 101.

⁵ *Ibid.*

⁶ *Ibid.*, 102.

The United Nations' (UN) Office on Drugs and Crime offers a much more encompassing definition in its publication "Handbook on Restorative Justice Programmes": "Restorative justice is an approach to problem solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies and the community."⁷ Further,

Restorative justice refers to a process for resolving crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of that conflict. Participation of the parties is an essential part of the process that emphasizes relationship building, reconciliation and the development of agreements around a desired outcome between victims and offender.⁸

This definition is more appropriate than those mentioned above because of its specification of the parties involved and its requirement that both the processes and the outcomes be reflective of the values of restorative justice. That the outcomes must focus on "redressing the harm done" effectively filters out retributive and rehabilitative programs that, as Levad writes, "instead follow the normative guides of balancing the scales of justice or treating the illness of offenders."⁹ Furthermore, this definition aligns with the three principles most common to the literature surrounding restorative justice, outlined by Daniel Van Ness and Karen Heetderks Strong:

- 1) Justice requires that we work to restore those who have been injured: victims, communities, and even offenders;
- 2) those most directly involved and affected by crime – victims, offenders, and community – should have the opportunity to participate as fully in the response as they wish; and
- 3) while

⁷ United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes, Criminal Justice Handbook Series* (New York: United Nations, 2006), 6.

⁸ Ibid.

⁹ Levad, *Restorative Justice*, 105.

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the government is responsible for preserving a just public order, the community's role in establishing and maintaining a just peace must be given special significance.¹⁰

Because of its detail and agreement with the values, to be discussed in the following section, and principles of restorative justice, it is the UN definition of restorative justice that is utilized in this essay.

At this juncture, having determined an appropriate definition upon which to base the present discussion, it is important that we reach beyond a basic description of the core aspects of restorative justice and explore the values upon which it is based. Participation, respect, community empowerment, flexibility and responsiveness of processes and outcomes, and commitment to the agreed upon solution are all values inherent to models of restorative justice.

Central to restorative justice is the idea that people can be empowered through participation. Victims, offenders, and the community affected by their interaction should all contribute to the process of restoring harmony following an offense. Proponents of restorative justice argue that, by involving all of those affected by a given offense in the resolution process, the individuals most affected can adopt the most appropriate and mutually accepted and beneficial means of conflict resolution.¹¹ Respect, too, is essential. It is important that any restorative justice process seek to reestablish the humanity of all those involved. Indeed, the recognition of each person's inherent value, as a human being and a member of a given community, justifies the application of restorative justice processes—which aim to involve all those affected by the offence to determine a mutually agreeable solution to the problem. It is also important that these solutions maintain a level of flexibility so that unforeseen complications or setbacks can be addressed without hindrance or protest. Restorative processes, therefore, are by their very nature contingent. Lastly, those involved in these processes must commit to the agreed upon solution. In theory, if all affected parties are involved

¹⁰ Ibid., 106.

¹¹ United Nations, *Handbook*, 8.

in determining a method of resolution, each will have an increased interest in seeing that the resolution succeeds. This value also ensures that all parties are, and feel as if they are, being fairly treated, and their views adequately considered. These values require that the needs of those involved are considered and that their roles in the process are ensured.¹²

There are a number of restorative justice initiatives that will be mentioned throughout this essay. I give them brief mention here, but they will be described in greater detail as they are mentioned in the forthcoming analysis. Restorative justice initiatives include: victim-offender mediation, community and family group conferences, sentencing circles, peacemaking circles, restorative cautioning, regulatory restorative justice, reparative probation and community boards and panels, and truth and reconciliation commissions.¹³

It is important to note that theories of restorative justice are heavily impacted by their cultural roots. Restorative forms of justice have long existed within indigenous cultures and continue to be practiced within indigenous communities today. Jane Dickson-Gilmore and Carol La Prairie write that restorative justice has been adopted and maintained by indigenous communities as a result of the conscious effort to oppose mainstream retributive justice.¹⁴ In its early conceptions, restorative justice was focused on increasing the level of participation in the judicial process. The aim of those who adopted restorative justice, it seems, was to move criminal justice away from “its hierarchical, adjudicative focus to a more balanced, participatory focus on resolving conflicts and restoring relationships.”¹⁵ Aboriginal communities developed independent

¹² Ibid., 8-9.

¹³ Andrew Ashworth, “Is Restorative Justice the Way Forward for Criminal Justice?” in *Restorative Justice: Critical Issues*, edited by Eugene McLaughlin, Ross Fergusson, Gordon Hughes, and Louise Westmarland (London: Sage Publications, 2003), 165-166; and The United Nations, *Handbook*, 14-15.

¹⁴ Jane Dickson-Gilmore and Carol La Prairie, *Will the Circle be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005), 91.

¹⁵ Ibid.

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restorative justice processes in order to reassert their independence and limit the effects on their communities of racially and culturally biased laws. Though these initiatives have been heavily influenced by the retributive systems with which they compete, their persistence and success as institutions are a testament to the viability of restorative justice initiatives.

The most well-known restorative practices utilized by First Nations communities in Canada are the healing circle and the sentencing circle. In both, all participants sit in a circle and discuss the offense in order to determine an amicable means to redress harms done. These circles are a place for taking responsibility and for reestablishing order to relationships.¹⁶ The importance of the circle for these communities goes beyond practical necessity. The circle has cultural significance that aligns with the values of restorative justice. Jane Dickson-Gilmore and Carol La Prairie elaborate:

The circle has long been viewed as a symbol of importance and empowerment among many First Nations...As informed by the circle, these [restorative] initiatives assert the power of its central attributes, namely, balance, equality, and a holistic approach to life...Within the circle...inequalities are broken down, as is the common reticence that impedes the sharing of information about conflict.¹⁷

The introduction of indigenous culture to the judicial process serves the added function of restoring the community's confidence in the judicial process, as well as empowering these communities to commit to a collective effort to maintain harmony.

Moving toward a discussion of restorative justice in theory as it has developed in recent decades, it is perhaps best to begin, as do Eugene McLaughlin *et al.* and Andrew Woolford in their respective publications, with the work of Norwegian criminologist Nils Christie. Christie, in his 1977 paper, "Conflicts as Property," argues that conflict, of which crime is a form, exists as a valuable resource that

¹⁶ *Ibid.*, 132.

¹⁷ *Ibid.*, 131.

can belong to someone, be sold to others, and be stolen.¹⁸ Christie argues that governments, he wrote of Scandinavian countries but his analysis applies to any government that controls the means of justice, have taken this resource from the communities in which crimes occur. By taking over the mechanisms for prosecution and conceptualizing crimes as having been committed against the state, making the state the victim rather than the individual or community, the community from which they are taken suffers a great loss.¹⁹ These communities are no longer forced to confront their shortcomings and, therefore, are not given the opportunity to redress them. To remedy this, Christie suggests that the power to resolve harms done through criminal acts should be returned to the communities in which they occur.²⁰ This can be accomplished, he writes, by establishing victim-oriented and community-based courts that would offer community members greater input into the judicial process.²¹

Restorative justice theory advanced in the late 1980s and early 1990s through the separate works of Howard Zehr and John Braithwaite. Both argued for a paradigm shift from the current retributive forms of justice present to Western societies. Zehr viewed restorative justice as the opposite of retributive justice, although his perspective on this particular method of framing restorative justice has since changed. Consequently, a theory of restorative justice developed that was based on what it was not—namely, retributive justice—rather than what it was.²² Andrew Woolford writes that this had the additional effect of characterizing restorative justice as a reactive model of justice.²³

¹⁸ Andrew Woolford, *The Politics of Restorative Justice: A Critical Introduction* (Halifax and Winnipeg: Fernwood Publishing, 2009), 48.

¹⁹ Nils Christie, “Conflict as Property,” in *Restorative Justice: Critical Issues*, Eugene McLaughlin, Ross Fergusson, Gordon Hughes, and Louise Westmarland, ed. (London: Sage Publications, 2003), 25-26.

²⁰ *Ibid.*, 27-28.

²¹ Woolford, *The Politics of Restorative Justice*, 48.

²² *Ibid.*, 50.

²³ *Ibid.*

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Braithwaite, writing in the late 1980s, helped to insert restorative ideals within existing criminological theory. His work addressed the issues associated with the stigmatization and labeling that accompanies those found guilty or accused of crimes. He revealed that the current retributive justice system may, in fact, further commit offenders to a criminal lifestyle.²⁴ The prosecution process devalued the offender as a member of society and limited his ability to positively contribute to his community in the future. In place of this detrimental system, Braithwaite suggested the use of “reintegration ceremonies” that would focus condemnation on the act rather than the actor.²⁵ The effect of these ceremonies is that the action is not associated with the character of the individual. The offender is able to face the shame of his actions and to move on from that shame with a full understanding of how his actions harmed others. Commenting on Braithwaite’s work, Dickinson-Gilmore and La Prairie write that stigmatization is harmful as it is accompanied by social exclusion, while shame is accompanied by social reintegration. Braithwaite’s work, like Zehr’s, contributed to the further development of a restorative justice theory, as well as restorative justice processes, by demonstrating its worth as a remedy to the shortcomings of retributive justice.

Braithwaite and Philip Petit furthered this theory by outlining the roles of the state and local communities in a restorative system. They write that the state is responsible for maintaining the political space needed in order for community-based courts to operate, while simultaneously ensuring that the legal rights of participants are not being violated. The state, then, would have the ability to intervene wherever community-based courts violated the rights of participants.²⁶ This was labeled by its authors as the republican theory of restorative justice because, as Lode Walgrave writes, the theory “synthesizes the legal institutional dimension (the objective rights and freedoms that are legally defined) and the informal relational

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid., 53.

dimension (the subjective assurance that others will respect these rights and freedoms).”²⁷

Furthermore, Albert Dzur and Susan Olsen argue that theories of restorative justice should be linked with theories of direct democracy. Theories of direct democracy encourage the participation of any and all individuals in the political decision-making process. This means involving each individual in the debate over a given proposal, as well as in the ultimate decision whether to adopt said proposal. Dzur and Olsen encourage proponents of restorative justice to increase the communicative potential of restorative justice by adopting the values of direct democracy: open and fair participation.²⁸

These early works led Heather Strang and Braithwaite to identify two different conceptions of restorative justice: a process conception, and a values conception. The process conception views restorative justice as a process that brings together all of the relevant stakeholders, those affected by some harm, to resolve conflict in a mutually agreeable fashion.²⁹ In the second view, the values conception, restorative justice is contrasted with retributive justice. Restorative justice values healing over punishment and therefore rejects punitive measures. Perhaps it is best to utilize the example given by the authors to reveal the difference between the two conceptions:

Someone...committed to a process definition might say that while a family group conference is a restorative justice process, a mediation between a single victim and a single offender is not – because in the latter there is no circle that includes or even invites all stakeholders...Someone...committed to a values conception of restorative justice might say that a community conference that sits in a circle and then decides to cane or incarcerate a

²⁷ Lode Walgrave, *Restorative Justice, Self-interest and Responsible Citizenship* (Cullompton: Willan, 2008), 140.

²⁸ *Ibid.*, 53-54.

²⁹ Heather Strang and John Braithwaite, *Restorative Justice and Civil Society* (Cambridge: Cambridge University Press, 2001), 1.

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child...is not restorative justice. In contrast, victim-offender mediation satisfies the values definition of restorative justice.³⁰

Strang and Braithwaite, however, encourage proponents of restorative justice to adopt both restorative processes and restorative values for a more encompassing and, necessarily, contingent development of restorative justice practices.³¹ The wholesale exclusion of punitive measures from restorative processes is as undesirable as the violation of privacy for the sake of ensuring maximum participation. Each case brought before a restorative court will require a certain amount of improvisation of the restorative processes.

The scholarly works mentioned above are the early major contributors to the development of restorative justice theory. They have theorized the principles upon which restorative justice is built, adopting practices and principles of justice present in indigenous cultures and applying them as remedies to the shortcomings of modern retributive justice systems.

Though restorative justice has emerged as a capable alternative to retributive justice models in many contexts, it is not immune to criticism. Andrew Ashworth offers a human-rights-based critique of restorative justice's ability to replace retributive forms of justice in criminal matters.³² The essence of his argument is that restorative justice models violate three principles of international human rights law: "the principle of independence and impartiality, the principle of proportionality, and the principle of compensation for wrongs."³³

First, Ashworth argues that international laws, such as that outlined in Article 6.1 of the European Convention on Human Rights, guarantee any offender the right to a fair hearing by an

³⁰ Ibid., 2.

³¹ Ibid.

³² Andrew Ashworth, "Restorative Justice: the Way forward for Criminal Justice?" 164-181.

³³ Ibid., 171.

independent and impartial tribunal.³⁴ He states that the involvement of the victim in the restorative judicial process undermines the independence of the tribunal, and is therefore a violation of international human rights law.³⁵ Proponents of restorative justice confront this criticism by calling into question the value of impartiality and objectivity. Many argue that the e objectivity and impartiality that result, in practice, in a retributive system are much too impersonal. This, however, does little to undermine the criticism as it is an argument against the value of retributive justice rather than an argument for restorative justice—a recurring theme in arguments offered by proponents of restorative justice.

There are cases, however, where impartiality and independence are difficult to establish. For example, in the aftermath of a civil war in which atrocities were committed by both sides, and in which neither side emerged as victorious, impartiality will be difficult to establish in the prosecution of any individual for committing atrocities. In this context, it may be useful to adopt restorative justice processes to redress the harms done by these individuals and aid in reconciliation, even if these individuals will not be punished as a result of these processes. Such an argument has been offered by Joanna R. Quinn. Focusing on the use of truth commissions as a restorative justice initiative, Quinn writes that truth commissions are able to foster aspects of reconciliation. To clarify, according to Quinn, a truth commission is an initiative which “provides a forum in which a society can learn about the abuses of the past.”³⁶ Moreover, a truth commission adopts the primary task of collecting “information about such abuses and to compile this information to produce a coherent account of the history of that society.”³⁷ Therefore, in circumstances where the desire or ability to prosecute perpetrators is lacking, restorative justice initiatives such as

³⁴ Ibid.

³⁵ Ibid., 172.

³⁶ Joanna R. Quinn, “Are Truth Commissions Useful in Promoting Restorative Justice?” in *Crosscurrents: International Relations*, 4th ed., ed. Mark Charlton (Toronto: Nelson Canada, 2005), 404.

³⁷ Ibid.

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the truth commission can reconcile individuals and communities within society that have been factionalized by the conflict. Restorative initiatives can provide a means to reconciliation in contexts where impartiality and independence of tribunals can not be guaranteed.

The second rights-based criticism leveled against restorative justice concerns proportionality of outcomes. Ashworth argues that the proportionality of outcomes is contingent on the individual will of the victim. Some will be vindictive, others forgiving. Restorative justice can not guarantee consistency in outcomes. In contrast, retributive justice systems are better equipped to create a consistent sentencing scheme, as courts are compelled to rely on precedent in justifying their deliberations.³⁸ Though this is true in many contexts, this argument does not hold for unprecedented situations—redressing the harms caused by Indian Residential Schools in Canada is an example. In such situations, restorative justice initiatives prove their worth. As Quinn notes, truth commissions can be adjusted in order to address the needs of a given situation.³⁹ Though she refers to truth commissions specifically, this flexibility is reflective of the values inherent to restorative justice theory and practice in general. Further, this flexibility allows restorative processes to account for all of the aspects of a given offense when determining outcomes. There are, therefore, circumstances wherein, from a legal and judicial perspective, restorative processes are preferable to retributive processes.

Ashworth's third critique concerns the principle of compensation for wrongs. He argues that the primary concern of victims is not the punishment of the offender, but rather that he be compensated for harms inflicted upon him by the offender.⁴⁰ By his argument, the victim's interest in the offender's punishment is no greater than any other member of the community. This criticism neglects the required participation of community members in the

³⁸ Ashworth, "Is Restorative Justice the Way Forward?" 172.

³⁹ Quinn, "Are Truth Commissions Useful?" 405.

⁴⁰ Ashworth, "Is Restorative Justice the Way Forward?" 173.

restorative process. Moreover, it assumes that restorative justice is absolutely opposed to consideration of precedent when determining length and harshness of punishment. As is previously mentioned in this essay, Strang and Braithwaite argue that restorative justice in practice should not deal in absolutes, but rather be open to consideration of any and all suggestions that may aid in the process of redressing harms. The assertion made by Ashworth that community members have as much an interest in the punishment of offenders as do victims is hardly relevant as a criticism of restorative justice because inclusion of the community's views is an essential aspect of restorative processes.

In the pages above, restorative justice, in theory, has been portrayed as an alternative to retributive justice. It was demonstrated that restorative justice has gained traction within aboriginal communities as it is reflective of these communities' values. Furthermore, a human rights-based critique was leveled against restorative justice theories. Despite these criticisms, restorative justice maintains its worth as an alternative to retributive justice in both mundane, meaning common criminal trials, and extreme circumstances, referring to post-conflict resolution following conflicts wherein large-scale atrocities have occurred. This worth has been widely acknowledged by Western societies, as restorative forms of justice have begun to gain prominence in juvenile justice systems throughout Europe, Canada, New Zealand and Australia.

Australia and New Zealand, particularly, have recognized the value of restorative justice. Their adoption of family group conferencing in place of court processes when dealing with youths has helped reduce the rate of recidivism in these states.⁴¹ Family group conferencing is a process of restorative justice that involves the offender, the victim, and their families in determining an appropriate remedy to wrongs committed. This solution is suggested to a judge who acts as the ultimate arbiter of justice. The most common

⁴¹ Loraine Gelsthorpe and Allison Morris, "Restorative Youth Justice: the last Vestiges of Welfare?" in *Youth Justice: Critical Readings*, edited by John Muncie, Gordon Hughes, and Eugene McLaughlin (London: Sage Publications, 2002), 244-245.

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outcomes are apologies and community involvement.⁴² Young offenders that claimed to have had a positive experience with conferencing—those who took the process seriously by confronting their past and claiming responsibility for their actions—have overwhelmingly avoided reoffending.⁴³

In this, and in the use of truth commissions in the aftermath of atrocities, the value of restorative forms of justice are revealed, as is the ability of restorative principles to be translated from theory into practice. Restorative justice has the ability to address the shortcomings of retributive justice and to improve the effectiveness of the justice system as a means of restoring harmony to communities that have experienced harm.

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⁴² Ibid., 244.

⁴³ Ibid., 245.

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