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Crime, Punishment, and Restorative Justice: From the Margins to the Mainstream

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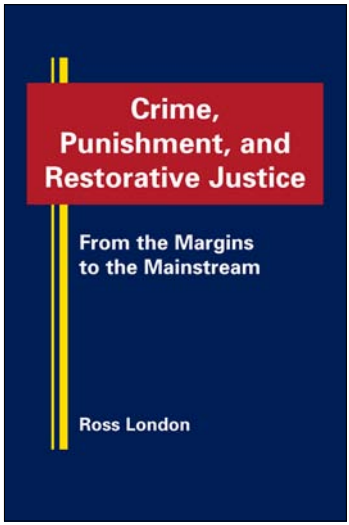

ISBN: 978-1-935049-33-3 hc

FIRSTFORUMPRESS

A DIVISION OF LYNNE RIENNER PUBLISHERS, INC.

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Boulder, CO 80301
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Introduction: Restoring Trust

The genesis of this book began on a train trip from New York to Boston. Traveling alone on my way to a criminal justice conference, I had a chance to do some thinking. I took out my legal pad and started jotting down notes.

* * *

After 25 years of practicing law—as a private attorney, public defender, prosecutor and culminating as a municipal court judge—I had recently enrolled as a graduate student in criminology because I was seeking answers to a number of perplexing questions about the system of which I had been a part. These questions essentially boiled down to one: Is this *really* the best we can do?

Despite the efforts of many brilliant minds and the expenditure of vast sums, we have managed to create a criminal justice system that transforms innumerable personal misfortunes into yet other calamities. Victims, who have suffered the trauma of a crime, enter the portals of this system with high expectations of justice, only to find themselves wandering its halls feeling bewildered, unfulfilled, and used. For those accused of a crime, entry into the system portends the beginning of a personal nightmare of dehumanization, ruinous financial losses, and unending suspicion. As a criminal justice professional, I came in contact with hundreds of human beings caught up in this labyrinth. Time and again, I saw the same look of despair on those who emerged from the process embittered, exhausted, and defeated.

Paradoxically, although I shared many of the frustrations of both the victims and offenders, I grew to admire the values of the system and the means we have adopted to uphold those values. The U.S. criminal justice system was never fully planned; it *evolved* over time in response to the competing demands for protection against crime and from

oppressive prosecution. Every innovation we have proposed to apprehend, detain, adjudicate, and sentence offenders has been counterbalanced with rules and procedures designed to protect the innocent. In a sense, the system has emerged from the clash of two nightmares: the nightmare of brutal, uncontrolled crime in the streets and the nightmare of false accusation. By many measures, we have done a good job at this balancing act. For most Americans, we have managed to keep crime to a tolerable level while continually expanding on a list of basic rights that are well beyond those in place when the Constitution was adopted.

Yet as respectful as I had become of the criminal justice system, I increasingly came to believe that it was fundamentally flawed, and not simply because of the personal inadequacies of those who administer it: the police who mishandle evidence, overzealous prosecutors, unprepared defense attorneys, inattentive jurors and overworked, underpaid court staff and probation officers. Much more troubling to me was the realization that, even when the system functions as it should (i.e., when cases are adjudicated swiftly, fairly, and conscientiously), we still don't seem to achieve very much. I worked hard to improve the fairness and efficiency in my own courtroom. Yet even on the best days—the days when all the parties arrived on time, when all the notices were properly served, when cases that could be settled were settled, and when other cases were tried to completion—even then, I had the hollow feeling that we didn't go far enough.

For criminal justice professionals (the judge, the staff, the attorneys), the conclusion of a case means the closing of one file and the opening of the next file. But what about the other lives that are involved? For the convicted offender, the conclusion of a case means a descent into a world of disdain and rejection that can be endured only by hardening the shell of denial and defiance that already sets him apart as a "criminal." *(Throughout this book, I refer to the defendant as male to reflect the statistical predominance of male criminality.)* For the victim, the conclusion of a case brings new questions: What happens now? When is the offender coming back? How will I be paid for my losses? How can I be protected from retaliation? As for the community at large—those who have to live in fear every day that a similar crime might happen to them—their questions, concerns, and voices are hardly ever heard.

It seemed to me that, in devoting all of its efforts to the tasks of determining culpability and imposing sanctions, the criminal justice system had succeeded in becoming an efficient instrument for condemnation and exclusion, but had utterly failed as an instrument of

healing and reconciliation. The system that had evolved as a powerful instrument for apprehending criminals, assessing blame and imposing punishment was oddly indifferent to the need of the victim, the offender, and the community to break the cycle of crime, blame, and punishment.

Unlike the experience of many judges in large cities, I returned home at the end of the day only a few blocks from the courtroom, into the same community lived in by the victims and, in many cases, by the offenders. I often wondered if all we were doing in court was "spinning our wheels." I kept running into the same faces, the same families and the same problems. Having come of age in the uproarious '60's and therefore being constitutionally indisposed to accept limitations on what the system can and cannot do, I started to become more interested in finding solutions than in merely "disposing cases." In a city the size of Hoboken, New Jersey—one square mile and a population of about 35,000—the chances were good that the victim and the offender either knew each other already or would bump into each other again sometime soon. For many cases, perhaps the majority, trials did not provide anything remotely like a sense of closure. In our "winner-take-all" adversary system, success for one side means defeat for the other—hardly a formula for peaceful coexistence.

Whenever possible, therefore, I tried to see if the parties themselves could come to agreement about what should be done in their case. The parties were almost always resistant to settling their differences at first. The victims wanted vindication, the defendants wanted exoneration, and neither side wanted compromise. And so, I did not propose compromise. Instead, I asked the victim a fairly simple, straightforward question, "What do you want to accomplish in this case?" Amazingly enough, with that one question, doors that seemed permanently shut started to open, feelings that seemed forever hardened started to thaw and possibilities emerged that had seemed impossible.

Of course, I had a decided advantage over other mediators. As the presiding judge, after listening to all of their stories and evaluating the quality of evidence, I was able to give the parties my "professional opinion" concerning their prospects if they insisted on a trial before my alternate judge. (I was obliged to recuse myself from cases that I mediated). Attorneys were particularly grateful for this advice because it punctured their clients' misconceptions about what they could achieve at trial. Both prosecutors who had to handle "prima donna" cops and defense attorneys who had to handle their "kings and queens of denial" thereby became facilitators of mediation, not obstacles to it. Moreover, this professional opinion helped ensure that the resulting agreements were in line with the outcomes that could be expected at trial (guilty

pleas, fines, community service, restitution, probation). But now, because the terms of the agreements were entered into voluntarily by the parties, unusually satisfying results could be achieved. Instead of feeling neglected or abused, the victim was fully involved. The defendant was able to stop lying to himself, his family, and his lawyers and accept responsibility "like a man." The prosecutor got his conviction. The defense attorney avoided yet another embarrassing defeat. And, as for me, I felt that I had accomplished something more than just sending another misfit off to jail. Beyond these results, the mediation sessions provided the opportunity for face-to-face dialogue, expressions of remorse, and creative solutions that could never be accomplished at trial. I developed a set of techniques for encouraging productive dialogue and continued to refine these techniques as a referee in the juvenile court once my term as municipal court judge was over. There, the motivation to resolve neighborhood problems—vandalism, bullying, assault, and gang rivalries—was even greater and obviously preferable to formal adjudication.

So maybe there was a better way after all! But I needed something more than my gut instinct to guide me. Once enrolled in graduate school, I embarked on a journey of intellectual discovery to find out if my grab bag of techniques and my instinctual desire for a more humane and responsive criminal justice system was supported by the findings and opinions of leading criminologists. Along the way, I found that criminologists have quite a lot of interesting things to say, but little agreement, as to the causes of crime and the best means for reducing it. What particularly interested me were ideas about the overall goals of the process; especially, the goals of criminal justice sentencing. I was searching for a comprehensive theory of criminal justice that not only accounted for and justified the system, but one that pointed the way to a more expansive vision of what we could achieve.

I was surprised to discover that the academics, far removed from the battlefield of the courtroom, are hardly less confrontational than my trial attorney brethren. Worse yet, their intellectual battles are far more insidious and enduring than legal confrontations, where courtroom theatrics are often followed by a round of drinks among "worthy adversaries." Perhaps because attorneys realize that their cause, in the end, is not their own and that their effectiveness is constrained by the often inconvenient *facts* of the case, most develop a fairly detached view that can be described as fatalistic or, perhaps, cynical. In short, attorneys tend to be good sports about the whole thing. But the academics who, having labored mightily to create an edifice of ideas, often come to view rival theories and theorists as threats to their standing among their peers.

This may account for the divisiveness that I noticed among sentencing theories and sentencing theorists. The advocates of "deterrence" and "incapacitation" regarded "rehabilitation" as hopelessly naïve and ineffectual, a feeling shared by "retributionists" who, further, claimed that all so-called "utilitarian" theories such as deterrence, incapacitation, *and* rehabilitation are morally deficient and potentially dangerous. To these charges, the utilitarians responded that retributionism, lacking a socially useful goal, is essentially irrational.

The uncompromising position of many of these sentencing theorists concerning the validity of their claims and the invalidity of rival claims was disconcerting to me, not only because it showed that criminologists had come no closer to agreement on these basic issues than the views of the average layman, but also because their insistence on the supremacy of one sentencing ideal over all others failed to reflect the reality of sentencing practice I had seen in every courtroom I had ever entered. Judges (with precious few exceptions) are no fools. They understand the strengths and weaknesses of competing sentencing goals. And so, in devising a reasonable sentence for any particular case, they do not pick only one sentencing goal to the exclusion of others. Instead, they try to find a sensible combination of goals that simultaneously reflects the need to deter future crime, to incapacitate dangerous offenders, to provide rehabilitation, and to impose retribution as a reflection of society's values. What I was looking for in my graduate studies was a principle that could help prioritize and guide this balancing of goals. Moreover, I was looking for a principle that could *go beyond* the limitations of each of these conventional theories; one that would promote the possibility of healing and reconciliation that the system, for all its virtues, seemed incapable of achieving.

In the course of my search for a more expansive conception of criminal justice, I came across the work of John Braithwaite. Braithwaite is a rarity among criminologists. Having achieved the reputation of a tough-minded analyst of corporate crime, he gained further renown as a communalistic visionary. In his influential work *Crime, Shame and Reintegration.* Braithwaite proposed a new way to deal with offenders; a way that, ironically, is far older than the existing system. The most potent means of controlling behavior, he argued, is the social network of the family and community. In ignoring the power of social approval, the modern criminal justice system relies on ever-harsher sanctions that not only are less effective than social approval, but they also result in the kind of stigmatization that produces further crime. A system dedicated to the goal of reintegration, he maintained,

offers the possibility of crime control and reabsorption of offenders often found in traditional societies.

Braithwaite's conception of community-based justice and his understanding of the need for reintegration were encompassed in Zehr's more expansive vision, one that was graced by a most sublime and beguiling name: *restorative justice*. I'm sure I was not alone in practically swooning over the possibilities for a new, better, more transformative kind of justice that is suggested by this name. And indeed, for many people, restorative justice became the long-sought alternative to a system they had come to loathe for a variety of reasons—political, personal, and religious. To the radicals of the Left, restorative justice meant an alternative to the oppressive power of the state. To prisoners' rights advocates, restorative justice meant an alternative to incarceration. To victims' groups, restorative justice meant the possibility of genuine involvement and concern for their welfare. For Native American and aboriginal groups, restorative justice meant the possibility of a return to traditional practices and values. For Mennonites and other Christian groups, restorative justice meant the replacement of Old Testament retributionism with New Testament forgiveness. And for all those in search of a better way, restorative justice provided hope. I recognized that no theory can be all things to all people, and that restorative justice—the theory with the seductive name—looked more like a "Noah's Ark" of criminal justice critics, idealists, and reformers rather than a well-formulated theory capable of practical application. There was a distinct danger that, by becoming a vehicle for everyone's fantasy, restorative justice might end up on the scrap heap of other panaceas that periodically arise in criminal justice to raise our hopes to dizzying heights before dashing them.

And so, as I started to read through the outpouring of literature on this newly emerging development in criminal justice, I tried to separate the "wheat from the chaff." My objective was to identify the primary values of restorative justice that resonated most with my own conception of justice and respect for the rule of law but were also capable of application in the real world of my personal experience both in and out of court.

Reading through the works of many authors on restorative justice, all with their own well-defended pet theories, the theme that consistently struck me as wholly original and crucial to the restorative justice perspective was *the goal of repairing the harm of crime.* By identifying this goal, restorative justice had not only envisioned an important alternative to traditional sentencing theory, but a fundamentally new orientation for the criminal justice system as a whole. Specifying the

ways in which this goal was to be achieved was, as I saw it, a secondary consideration. Once the goal of repairing harm was viewed as a guiding principle, it was possible to imagine any number of procedural innovations that could help to accomplish this task.

Now my focus turned to more specific questions. If the key goal of restorative justice is repairing the harm of crime, what exactly *is* the harm of crime that needs repairing? Is it injury, property loss, psychological damage, or all of these? What can the system do to repair that damage? And what, if anything, can the defendant do to repair the damage he has caused?

* * *

Such were my thoughts as the train chugged along the coast of Connecticut and on up to Boston. By now, my legal pad was filled with notes—most of which were quite illegible to the average mortal—all cumulating in one boldly marked question: ***What is the victim's basic loss****?*

I paused for a moment of reflection, and then wrote down a single-word answer: *trust*.

What distinguishes crime from other types of injuries, it seemed to me, is that it represents a fundamental breach of trust. For the victim, the experience of crime results in a loss of trust in the offender and in the society that failed to provide basic security. The offender, now having been labeled as being "untrustworthy," is an outsider to the law-abiding community. He has become, literally, an "outlaw." Further questions raced into my mind: Is it really possible to restore trust? Is there anything an offender can do to regain trust, or must he remain a permanent outsider? Is there anything the criminal justice system can do to promote the restoration of trust?

In contemplating answers to these questions as well as related ones, I found that focusing attention on the goal of regaining trust not only helped to clarify the basic principles, strategies, and procedural innovations of restorative justice both but also helped to address some of its major dilemmas. I am grateful for the opportunity afforded me by graduate school to contemplate these issues at my leisure rather than in the midst of a hectic court calendar. In the course of my studies, I had the chance to question some of my core beliefs about the use punishment, the value of forgiveness, and the role of the victim in criminal sentencing. I also came to appreciate and eventually utilize the tools of social science research to find answers based on empirical data

and not simply on opinions, no matter how compelling they might appear to be.

Overview of the Book

The result of that process of study, soul-searching, and number crunching is this volume. In the first half, I invite the reader to explore a *comprehensive* approach to restoration; attempting to resolve the major issues that have prevented restorative justice from bridging the gap between the margin and the mainstream of criminal justice practice. In the second half, we will consider the practical implications this approach can have upon the way we handle criminal justice in this country—from policing to corrections.

Our exploration begins in the following chapter, Chapter 2, in which I describe the basic concepts of restorative justice and trace its development from an idealistic vision of a new criminal justice "paradigm" to a worldwide movement. The chapter ends by focusing on the two major issues faced by restorative justice as it moves from the margins to the mainstream of criminal justice: (1) the problem of private justice and (2) the problem of punishment. To resolve these issues, I attempt to distinguish between the core mission of restorative justice and the host of collateral values with which it has been associated.

In Chapter 3 I advance the claim that the greatest innovation of restorative justice is not in creating new *criminal justice practices*, but in creating a new *criminal justice goal*: repairing the harm of crime. By focusing on this as an overarching goal, I argue, we employ a powerful tool to examine and to reform every aspect of the criminal system. If the central goal of restorative justice is repairing the harm of crime, the next task is to identify *what* is the essential harm of crime. I argue that the kind of harm essentially associated with the commission of a crime is the *loss* of trust. The core mission of restorative justice, then, is the *restoration* of trust. But what is needed to restore personal trust? The guiding insight here is that, given our human fallibilities, breaches of trust are commonplace in human relations; yet we somehow manage to repair those breaches and restore relationships of trust. If we can figure out how this is done on an interpersonal level, we might be able to apply those lessons to the problem of repairing the harm of crime. In this chapter, I invite readers to brainstorm about various ways that trust might be restored in the aftermath of several crime scenarios: beginning with a simple property offense and ending with a violent crime.

In Chapter 4, this analysis of restoring personal trust undergoes a significant transformation. Here, I argue that we cannot design a

comprehensive criminal justice system based on lessons learned from the model of restoring personal trust unless we also consider another dimension of trust: trust in society. This expanded analysis of trust presents the key to solving one of the most crucial problems facing the development of restorative justice: reconciling the goal of informal justice (based on personal encounters between the victim and offender) with the requirements of law and principles of equality. After discussing a number of proposed solutions to this problem, I introduce my own solution based on the analysis of Canadian philosopher Susan Dimock who distinguishes between two dimensions of trust. Because trust has both a personal and a social dimension, the restoration of trust also must operate on *both* an individual and a societal level. For a criminal sanction to address both levels of trust, I propose a procedural solution whereby the conditions for regaining social trust operate as "outer boundaries" of sentencing severity reflecting society's interest in maintaining norms of conduct, but within those boundaries we are free to explore conditions to regain personal trust in the individual offender. Distinguishing between these two levels of trust enable us not only to solve the problem of private, informal justice, but also to integrate a host of competing sentencing theories under a single all-encompassing goal of restoration.

My purpose in Chapter 5 is to deepen our understanding of the importance of repairing trust. To do so, I explore the remarkably convergent findings of sociobiologists and economists concerning the evolution of cooperative behavior and its associated emotional responses, all of which have a bearing on the relation between trust and justice. My argument here is that the establishment of trust is not simply an incidental benefit of life in society. It is, instead, an essential precondition of social cooperation. Yet all these theoretical discussions could amount to nothing more than an intellectual exercise unless they resonate with and are confirmed by our powerful, instinctual responses to the experience of justice and injustice. My belief is that the prospect of restoring trust taps into these instinctual responses in a way that genuinely respects the needs of crime victims. Furthermore, I attempt to explain why understanding the role of trust in social relations helps us to comprehend the nature of crime and the process of identifying, punishing, and excluding offenders as well as what is necessary to bring them back into the "fold."

The next two chapters are devoted to a major theme of this book: *the pathway back for victims and offenders.* In Chapter 6, I argue that the "maximalist" model of restoration that utilizes apology, restitution, and the voluntary submission to a deserved punishment affords crime

victims a foundation for the healing and closure that they seek. Here, I examine the competing views between restorative justice theorists concerning the role of punishment in a system dedicated to restoration, and contrast the claims of those who regard punishment as the antithesis of restoration with those who look upon punishment as a necessary instrument of restoration. In this review, I present the results of my own empirical research: The imposition of what the victim regards as a deserved punishment and, more importantly, *the perceived failure to impose a deserved punishment* are significant factors in the emotional recovery of crime victims. These findings indicate further that, while punishment is certainly a necessary component of criminal justice, its use can be minimized in a responsible manner if punishment is coupled with other effective means of engendering trust. It is the nexus of apology, restitution, and deserved punishment, I argue, that offers crime victims a realistic and encouraging pathway to genuine healing and forgiveness. In Chapter 7, I examine how the criminal justice system acts as a kind of rite of passage by which offenders are excluded from the "moral community." But is it truly possible to move on from that exclusion to inclusion? In this chapter, I maintain that the pathway back to inclusion is indeed possible within a criminal justice system designed to facilitate the restoration of trust in the offender by employing the critical nexus of apology, restitution and voluntary submission to a deserved o punishment.

Guided by the principle of restoring trust, in Chapter 8 I examine a number of important issues in criminal sentencing theory and practice while always keeping in mind the question: What must be done to regain trust in the offender and in society? Using this approach, the possibilities for significant change become manifest to anyone with an open mind—and an open heart.

Chapter 9 explores the interaction of trust and community; that is, how the community serves the development of trust and how relations of trust enhance the life of the community. In this chapter, I also examine some of the key issues surrounding the participation of community members at restorative justice conferences. In Chapter 10, I pause to apply the theory of restorative justice to a number of crime scenarios in a restorative justice "workshop." By comparing the restoration of trust approach with both conventional criminal justice administration and other forms of restorative justice practices, readers of this chapter will gain a deeper appreciation of the impact of these differing models on the achievement of justice and restoration for the victim, the community, and the offender. Chapter 11 extends our analysis to one of the most troubling problems in the U.S. criminal justice system today: the

disproportionate incarceration of minority offenders. I have attempted to approach this issue with a degree of candor that is often avoided in such discussions. But if nothing else were to be achieved by writing this volume, the communication of its pragmatic and hopeful message to those who live in and those who serve the minority community would make these efforts worthwhile.

Chapter 12 is all about the issue of openness to new ideas. Here, I acknowledge that for many of those who have been attracted to restorative justice as a purely nonpunitive alternative to the conventional system, the restoration of trust model that I am putting forward—one that includes punishment as a sentencing alternative—will represent a corruption of the purity of the original restorative justice paradigm. I confront that issue directly, and in some depth, because I consider the problem of conceiving restorative justice as a new "paradigm" to be the single greatest conceptual impediment to open discussions of restorative justice theory and practice. To readers unfamiliar with the issue, it might seem as if the controversy over paradigms is a matter of concern only to academicians. But this is an intellectual barrier that must be confronted if any of the issues that I discuss are to be considered with an open mind.

In Chapter 13, I apply the restoration of trust approach to a wide range of criminal justice reforms ranging from policing to corrections. The final chapter, Chapter 14, not only sums up what has come before, but also serves as an invitation to readers to expand and extend these restorative justice concepts to the real world that they experience.

At its core, this book seeks answers to the question: What must be done to restore trust in the offender and in society in the aftermath of crime? My hope is that this query will stimulate innovative thinking by the criminal justice theorists, the practitioners, and, most of all, the students whose own search for a "better way" is just beginning.