The Limits of Restorative Justice

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by Kathleen Daly[1]

Restorative justice (RJ) is a set of ideals about justice that assumes a generous, empathetic, supportive, and rational human spirit. It assumes that victims can be generous to those who have harmed them, that offenders can be apologetic and contrite for their behavior, that their respective "communities of care" can take an active role of support and assistance, and that a facilitator can guide rational discussion and encourage consensual decision-making between parties with antagonistic interests. Any one of these elements may be missing, and thus potentially weaken an RJ process. The ideals of RJ can also be in tension. For example, it may not be possible to have equity or proportionality across RJ outcomes, when outcomes are supposed to be fashioned from the particular sensibilities of those in an RJ encounter.

Achieving justice – whether RJ or any other form – is a fraught and incomplete enterprise. This is because justice cannot be achieved, although it is important to reach for it. Rather, drawing from Derrida, justice is an "experience of the impossible" (Pavlich, 1996 p.37), "an ideal, an aspiration, which is supremely important and worth striving for constantly and tirelessly" (Hudson, 2003 p.192).

This chapter addresses a selected set of limits of RJ, those concerning its scope and its practices. My discussion is selective and limited. I do not consider the discursive limits of liberal legality, as these are viewed through a postmodern lens (Arrigo, 2004), nor do I consider related problems when nation states or communities cannot imagine particular offences or understand "ultra-Others" (see Hudson, 2003 pp.212-3). My focus instead is on the limits of current RJ practices, when applied to youth justice cases in common law jurisdictions. There are other contexts where RJ can be applied, including adult criminal cases; non-criminal contexts (school disputes and conflicts, workplace disputes and conflicts, and child welfare); and responding to broader political conflict or as a form of transitional justice practice, among other potential sites (see Braithwaite, 2002). I focus on RJ in youth justice cases because it currently has a large body of empirical evidence. However, as RJ is increasingly being applied in adult cases and in different contexts (pre- or post-sentence advice, for example, as is now the case in England and New Zealand), we might expect to see different kinds of limits emerging.

THE SCOPE OF RJ

Limit (1). There is no agreed-upon definition of RJ.

There is robust discussion on what RJ is or should be, and there is no consensus on what practices should be included within its reach. One axis of disagreement is whether RJ should be viewed as a process or an outcome (Crawford & Newburn, 2003). A second is what kinds of practices are authentic forms of RJ, what kinds are not, and what is in-

between (McCold & Wachtel, 2003; *Contemporary Justice Review,* 2004). A third is whether RJ should be viewed principally as a set of justice values, rather than a process or set of practices (compare, e.g., Braithwaite, 2003 and Johnstone, 2002, with von Hirsch, Ashworth & Shearing, 2003), or whether it should include both (Roche, 2003). Finally, there is debate on how RJ can or should articulate with established criminal justice (CJ).

A lack of agreement on definition means that RJ has not one, but many identities and referents; and this can create theoretical, empirical, and policy confusion. Commentators, both advocates and critics, are often not talking about or imagining the same thing. Although the lack of a common understanding of RJ creates confusion, especially for those new to RJ, it reflects a diversity of interests and ideologies that people bring to the table when ideas of justice are discussed. A similar problem occurred with the rise of informal justice in the late 1970s. Informal justice could not be defined except by what it was not, i.e., it was not established forms of criminal justice (Abel, 1982). An inability to define RJ, or justice more generally, is not fatal. Indeed, it is a logical and defensible position: there can be no "fixed definition of justice" because justice has "no unchanging nature" and "it is beyond definition" (Hudson, 2003 p.201, characterizing the ideas of Lyotard and Derrida).

Gerry Johnstone (2004) suggests that the RJ advocates have too narrowly focused their efforts on promoting RJ by claiming its positive effects in reducing re-offending and increasing victim satisfaction. Instead of taking this instrumental and technical tack, Johnstone argues that we should see RJ as a set of ideas that challenge established CJ in fundamental ways. There is much to commend in having this more expansive vision of RJ as a long term political project for changing the ways we think about "crime," "being a victim," "responding to offenders," among other categories nominated by Johnstone. However, I restrict my use of the term to a set of core elements in RJ practices. I do so not to limit the potential applicability of RJ to other domains or as a political project for social change, but rather to conceptualize justice practices in concrete terms, not as aspirations or values. As RJ takes shape and evolves, it is important that we have images of the social interactions being proposed. I identify these core elements of RJ:

- it deals with the penalty (or post-penalty), not fact-finding phase of the criminal process;

- it normally involves a face-to-face meeting with an admitted offender and victim and their supporters, although it may also take indirect forms;

- it envisions a more active role for victim participation in justice decisions;

- it is an informal process that draws on the knowledge and active participation of lay persons (typically those most affected by an offence), but there are rules circumscribing the behavior of meeting members and limits on what they can decide in setting a penalty;

- it aims to hold offenders accountable for their behavior, while at the same time not stigmatizing them, and in this way it is hoped that there will be a reduction in future offending; and

- it aims to assist victims in recovering from crime.

As we shall see, some (or all) of these elements may not be realized in RJ practices. For example, an RJ process aims to assist victims in recovering from crime, but this may be possible for some victims more than others. And although it is hoped that an RJ process will shift admitted offenders toward a law-abiding future, this too may occur for some, but not others. It should be emphasized that victims are not forced to meet an admitted offender in an RJ process. There can be other ways in which victims may engage an RJ process, including through the use of victim representatives or material brought into the meeting itself. In fact, some have proposed that victims have access to RJ processes when a suspect has not be caught for (or admitted to) an offence.

Limit (2). RJ deals with the penalty, not fact-finding phase of the criminal process.

There is some debate over whether RJ processes could be used in fact-finding, but virtually all the examples cited are of dispute resolution mechanisms in pre-modern societies, which rely on particular sets of "meso-social structures" that are tied to kinship, geography, and political power (see discussion below by Bottoms, 2003; see also Johnstone, 2002). When we consider the typical forms of RJ practices, such as family group conferences (in New Zealand), family or community conferences (in Australia), police restorative cautioning schemes (in selected jurisdictions in England and North America), circles and sentencing circles (North America), or enhanced forms of victim-offender mediation (North America and some European countries), we see that all are concerned with what a justice practice should be *after* a person has admitted committing an offence. RJ does not address if a "crime" occurred or not, or whether a suspect is "guilty" of a crime or not. Rather, it focuses on "what shall we do" after a person admits that s/he has committed an offence.

Ultimately, as I shall argue, we should view this limit as a strength of RJ. The reason is that it bypasses the many disabling features of the adversarial process, both for those accused of crime and for victim complainants. Without a fact-finding or investigating mechanism, however, RJ cannot replace established CJ. To do so, it must have a method of adjudication, and currently it does not. However, RJ can make in-roads into methods of penalty setting (in the context of court diversion or pre-sentence advice to judicial officers), and it may be effective in providing assurances of safety to individual victims and communities when offenders complete their sentences (in the context of post-sentence uses of RJ), but all of these activities occur only after a person has admitted committing an offence.

Several commentators point out that RJ differs from established CJ in that it is participatory and consensually-based, not adversarial. However, this muddles things greatly. The reason that established CJ is adversarial is that its adjudication process rests on a fundamental right of those accused to say they did not commit an offence[2] and to defend themselves against the state's allegations of wrong-doing. There may well be better methods of adjudicating crime, and a troubling feature of established CJ is how long it takes for cases to be adjudicated and disposed; but surely, no one would wish to dispense with the right of citizens to defend themselves against the state's power to prosecute and punish alleged crime.

The focus of RJ on the penalty (or post-penalty) phase can be viewed as a strength. It enables us to be more imaginative in conceptualizing what is the "right response" to offending behavior, and it opens up potential lines of communication and understanding between offenders, victims, and those close to them, when this is desirable (and it may not always be desirable). Communication and interaction are especially important elements because many victims want answers to questions, for example, about why *their* car was stolen, and not another person's car. They may be concerned about their security and seek reassurances from an offender not to victimize them again (although this may not stop an offender from victimizing others). There can be positive sources of connection between the supporters of offenders (say a mother or father) and victims or their supporters. All of this is possible because RJ processes seek a conversational and dialogic approach to responding to crime. Decisions are not made by a distant magistrate or judge, and an overworked duty solicitor and prosecutor with many files to process. In established CJ processes, research shows that in the courtroom, a defendant is typically mute and a victim is not present. State actors do all the work of handling and processing crime. The actual parties to a crime (the persons charged and victim-complainants) are bystanders or absent.

Some victim advocates who are critical of RJ think that it is "outside" or not part of established CJ. Although a common perception, it is inaccurate. In all jurisdictions where RJ has been legislated in response to crime, it is very much "inside" the established CJ process, as the police or courts make a decision about how to handle a case.

RJ IDEALS AND PRACTICES

There is a gap between the ideals or aspirations for RJ and actual practices. This gap should not surprise us because the ideals for RJ are set very high, and perhaps too high. Advocates have made astonishing claims for what RJ can achieve, and what it can do for victims, offenders, their family members, and communities. Thus, a gap arises, in part, from inflated expectations for what RJ can achieve. There are deeper reasons for the gap, however.

First, as Bottoms (2003 p.109) argues, the "social mechanisms of RJ" rest on an assumption that "adequate meso-social structures exist to support RJ-type approaches." By "meso-social structures," Bottoms refers to ordered sets of relationships that are part of pre-modern societies (for example, residence, kinship, or lineage). These relationships embed elements of "intra-societal power" and coercion, which make dispute settlement possible (see also Merry, 1982). A second feature of relationships in pre-modern societies is that disputants are "part of the same moral/social community." They live in close proximity to one another or are related to one another, and typically wish to continue living in the community. These meso-social structures and "thick" social ties, which are commonly associated with pre-modern (or *gemeinschaft*) societies,[3] are not present in modern urban contemporary societies. Thus, as Bottoms (2003 p.110) suggests, "a 'blanket' delivery of RJ … is always likely to achieve modest or patchy results in contemporary societies."

Second, as I suggest (Daly, 2003 p.200), gaps emerge because those participating in an RJ process may not know what is supposed to happen, how they are supposed to act, nor what an optimal result could be. Participants may have an idea of what "their day in court" might be like, but they have little idea of what "their day in an RJ conference" would be like. Moreover, effective participation requires a degree of moral maturity and empathetic concern that many people, and especially young people, may not possess. Finally, we know from the history of established CJ that organizational routines, administrative efficiency, and professional interests often trump justice ideals (Daly, 2003 p.232). RJ is no exception. It takes time and great effort to create the appropriate contexts for RJ processes to work effectively, including a facilitator's contacting and preparing participants, identifying who should be present, coordinating the right time for everyone, running the meeting, and following up after it is over.

Some commentators argue that it is more appropriate to compare "what restorative justice has achieved and may still achieve with what conventional justice systems have to offer" (Morris, 2002 p.601). This is a valid and important point. We know that substantial gaps exist between the ideals and practices of established CJ. Thus, for example, it would be relevant to compare the effects of the court's sentencing practices on victims, offenders, and others with their participation in penalty discussions in RJ meetings. Although court-conference comparative research can be illuminating and helpful, there is also a value to observing and understanding what happens in an RJ process itself, including the variable degree to which the aims of RJ are achieved. When we do that, several limits of RJ are apparent. It is important to bear in mind that these limits are not necessarily peculiar to RJ; they may have their analogy in established CJ as well. I draw from my research on youth justice conference in South Australia (the South Australia Juvenile Justice [SAJJ] project, Daly, 2000, 2001a, 2002, 2003, 2005; see Daly et al., 1998, Daly, 2001b for SAJJ technical reports), along with other research, to elucidate these limits.

Limit (3). It is easier to achieve fairness than restorativeness in an RJ process.

Studies of RJ in Australia, New Zealand, and England often examine whether the observer-researcher, offender, and victim perceive the process and outcome as fair. All published studies find high levels of perceived fairness, or procedural justice, in the process and outcome (see review in Daly 2001a for Australian and New Zealand research; see also Hoyle, Young & Hill, 2002; Crawford & Newburn, 2003). For example, to questions such as "were you treated fairly?," "were you treated with respect?," "did people listen to you?," among other questions, a very high per cent of participants (80 per cent or more) say that they were. In addition, studies show that offenders and victims are actively involved in fashioning the outcome, which is indicative that laypeople are exercising decision-making power. Overall, RJ practices in the jurisdictions studied definitely conform to the ideals of procedural justice.

Compared to these very high levels of procedural justice, there appears to be relatively less evidence of "restorativeness." The measures of restorativeness used in the SAJJ project include the degree to which the offender was remorseful, spontaneously apologized to the victim, and understood the impact of the crime on the victim; the degree to which victims understood the offender's situation; and the extent of positive movement between the offender, victim, or their supporters. Depending on the variable,

restorativeness was present in 30 to 60 per cent of the youth justice conferences studied.[4] Thus, RJ conferences receive high marks for procedural fairness and victim and offender participation, but it may be more difficult for victims and offenders to resolve their differences or to find common ground in an RJ meeting (Daly, 2001a, 2003).

Why is fairness easier to achieve than restorativeness? Fairness is largely, although not exclusively, a measure of the behavior of the professional(s) (the facilitator and, depending on the jurisdiction, a police officer). As the professionals, they are polite, they listen, and they establish ground rules of respect for others and civility in the conference process. Whereas fairness is established in the relationship between the professionals and participants, restorativeness emerges in the relationships between a victim, an offender, and their supporters. Being polite is easier to do than saying you are sorry; listening to someone tell their story of victimization is easier to do when you are not the offender. Indeed, understanding or taking the perspective of the other may be easier when you are not the actual victim or the offender in the justice encounter.

Restorativeness requires a degree of empathic concern and perspective-taking; and as measured by psychologists' scales, these qualities are more frequently evinced for adults than adolescents. For example, from interviews with youthful offenders, the SAJJ project found that over half had not thought *at all* about what they would say to the victim. Most did not think in terms of what they might *offer victims*, but rather what they would be *made to do by others*. It is possible that many adolescents may not yet have the capacity to think empathetically, to take the role of the other (Frankenberger, 2000); they may be expected to act as if they had the moral reasoning of adults when they do not (Van Voorhis, 1995). And, at the same time, as we shall see in limits (4) and (5), victims may have high expectations for an offender's behavior in the conference process, which cannot be realized, or victims' distress may be so great that the conference process can do little to aid in their recovery.

Limit (4). A "sincere apology" is difficult to achieve.

It is said that in the aftermath of crime, what victims want most is "symbolic reparation, primarily an apology" (Strang, 2002 p.55, drawing from Marshall & Merry, 1990). Perhaps for some offences and some victims, this may be true; but I suspect that most victims want more than an apology. Fundamentally, victims want a sense of vindication for the wrong done to them, and they want the offender to stop harming and hurting them or other people. A sincere apology may be a useful starting point,[5] but we might expect most victims to want more. In research on violent offences, for example, Cretney and Davis (1995 p.178) suggest that a "victim has an interest in punishment," not just restitution or reparation, because punishment "can reassure the victim that he or she has public recognition and support."

Let us assume, for the sake of argument, that a sincere apology is what victims mainly desire. What are the elements of a sincere apology, and how often might we expect this to occur in an RJ process?

Drawing from Tavuchis' work on the sociology of apology (1991), Bottoms (2003 pp.94-8) distils the "experiential dynamics" of an "ideal-typical apology:"[6]

In the fully-accomplished apology … we have first a *call* for an apology from the person(s) who regard themselves as wronged, or from someone speaking on their behalf; then the *apology* itself; and finally an expression of *forgiveness* from the wronged to the wrongdoer (p.94, emphasis in original).

Bottoms then says that "each of these moves" in the fully-accomplished (or ideal typical) apology "can be emotionally fraught" such that "the whole apologetic discourse is (on both sides) 'a delicate and precarious transaction'" (quoting Tavuchis, 1991 p.vii).

It is important to distinguish between two types of apologies: an "ideal-typical apology," where there is an expression of forgiveness from a victim to an offender, and a "sincere apology," where there is a mutual understanding between the parties that the offender is really sorry, but there is no assumption of forgiveness. I make this distinction because we might expect a "sincere apology" to occur in an RJ process, but we should not expect a victim to forgive an offender. In fact, I wonder if Tavuchis' formulation may be unrealistic in the context of a victim's response to crime. Tavuchis analyzes a range of harmful or hurtful behavior, not just crime; and I suspect that forgiveness may arise more often in non-criminal than in criminal contexts.

There is surprisingly little research on the character of apologies in RJ processes. From the RISE project, we learn that conference victims rated the offender's apology as "sincere" (41 per cent), and a further 36 per cent rated it "somewhat sincere" (Strang, 2002 p.115; 2004 personal communication). Hayes's (2004) summary of RISE observational and interview data on the apology process concludes that "the ideal of reconciliation and repair was achieved in less than half of all cases."

The SAJJ project explored the apology process in detail (see Daly, 2003 pp.224-5). When we asked the youth why they decided to say sorry to victims, 27 per cent said they did not feel sorry but thought they'd get off easier, 39 per cent said to make their family feel better, and a similar per cent said they felt pushed into it. However, when asked what was the *main reason* for saying sorry, most (61 per cent) said they really were sorry. When we asked victims about the apology process, most believed that the youth's motives for apologizing were insincere. To the item, the youth wasn't sorry, but thought they would get off easier if they said sorry, 36 per cent of victims said "yes, definitely" and another 36 per cent said "yes, a little." A slim majority of victims believed that the youth said sorry either to get off more easily (30 per cent) or because they were pushed into it (25 per cent). Just 27 per cent of victims believed that the main reason that the youth apologized was because s/he really was sorry.[7]

This mismatch of perception between victims and offenders was explored further, by drawing on conference observations, interview material, and police incident reports to make inferences about the apology process for all 89 conferences in the SAJJ sample (Daly, 2005). The results reinforce the findings above: they reveal that communication failure and mixed signals are present when apologies are made and received. Such communication gaps are overlaid by the variable degree to which offenders are in fact sorry for what they have done. In 34 per cent of cases, the offenders and victims agreed (or were in partial agreement) that the offender was sorry,[8] and in 27 per cent, the offenders and victims definitely agreed that the offender was not sorry. For 30 per cent,

there was a perceptual mismatch: the offenders were not sorry, but the victims thought they were (12 per cent); or the offenders were sorry, but the victims did not think so (18 per cent). For the remaining 9 per cent, it was not possible to determine. The findings show that a sincere apology may be difficult to achieve because offenders are not really sorry for what they have done, victims wish offenders would display more contrite behavior, and there are mis-readings of what the other is saying.

Hayes (2004) proposes an added reason for why sincere apologies are difficult to achieve. He suggests that there are "competing demands" placed on youthful offenders in the conference process: they are asked both to explain what happened (or provide an "account") and to apologize for what they did. Hayes surmises that "offenders' speech acts … may drift from apologetic discourse to mitigating accounts and back again." Victims may interpret what is said (and not said) as being insincere.

Limit (5). The conference process can help some victims recover from crime, but this is contingent on the degree of distress they experienced.

One of the major aims of a RJ process is to assist victims in recovering from the disabling effects of crime. This central feature of RJ has not be explored in any systematic way. The SAJJ data offer insights on this complex process, and here I distil from a study of the impact of crime on victims for their likelihood of recovery a year later (see Daly, 2005).

An important finding, although typically not discussed in the RJ literature, is that victims experience crime differently: some are only lightly touched, whereas others experience many disabling effects such as health problems, sleeplessness, loss of self-confidence, among others. To describe this variability, I created a measure of "victim distress," which was derived from a set of questions about the effects of crime.[9] Initially, I identified four categories of victims: no distress (28 per cent), low distress (12.5 per cent), moderate distress (36.5), and high distress (23 per cent). For ease of analysis, I then collapsed the four groups into two, combining the no/low distress (40.5 per cent) and the moderate/high distress (59.5 per cent), which, for convenience, I will refer to as the "low" and "high" distress victims, respectively.

Some important findings emerged. The high distress group was significantly more likely to be composed of female victims, personal crime victims (including those victimized in their occupational role or at their organizational workplace), violent offences, and victims and offenders who were family members or well known to each other. The offences most likely to cause victims distress were assaults on family members or teachers (89 per cent in the high distress group); adolescent punch-ups (76 per cent); and breaking into, stealing, or damaging personal property (75 per cent). By comparison, the offences least likely to cause victims distress were breaking into, stealing, or damaging organizational property (19 per cent) and stranger assault (33 per cent). Theft of bikes or cars was midway (55 per cent of victims were in the high distress group).

Victims' distress was significantly linked to their attitude toward offenders and their interest to find common ground during the conference. For example, while 43 per cent of high distress victims had negative attitudes toward the offender after the conference,

this was the case for just 8 per cent of low distress victims. Most high distress victims said it was more important for them to be treated fairly (67 per cent) than to find common ground with the offender, whereas most low distress victims (71 per cent) said it was more important to find common ground. This is a key finding: what crime victims hope to achieve from an RJ process, that is, whether to seek mutual understanding with offenders (other-regarding victims) or to be treated well as individuals (self-regarding), is related to the character and experience of the victimization. Organizational and stranger assault victims were most likely to be other-regarding, that is, to want to find common ground; personal property crime victims were least likely to be other-regarding; and adolescent, family, and teacher assault victims fell in between.

In general and in the context of youth justice, victims who are only lightly touched by a crime orient themselves more readily to restorative behaviors. Compared to high distress victims, it was easier for the low distress group to be other-regarding because the wrong had not affected them deeply. After a conference ended, the high distress victims were far more likely to remain angry and fearful of offenders, and to be negative toward them, than the low distress victims. This result anticipates findings on victim recovery a year later.

In 1999, the SAJJ researchers re-interviewed the victims and asked them, "Which of the following two statements better describes how you're feeling about the incident today? Would you say that it is all behind you, you are fully recovered from it; or it is partly behind you, there are still some things that bother you, you are not fully recovered from it." Two-thirds said that they had recovered from the offence and it was all behind them. Thus, most victims had recovered from the offence a year later, but which ones? And did the conference process assist in their recovery?

When comparing victim distress in 1998 with their recovery a year later, there were startling results. Whereas 63 per cent of the moderate, 78 per cent of the low, and 95 per cent of the no distress victims had recovered in 1999, 71 per cent of the high distress victims had *not* recovered. Thus, for the most highly distressed victims, an RJ process may be of little help in recovering from crime. In 1999, we also asked victims, "Would you say that your ability to get the offence behind you was aided more by your participation in the justice process or things that only you could do for yourself?" Half (49 per cent) said their participation in the justice process, and 40 per cent, only things they could do for themselves; 11 per cent said both were of equal importance. The recovered victims were more likely to say participation in the justice process (72 per cent) than the non-recovered victims (38 per cent). Likewise, the low distress victims were more likely to say participation in the justice process (77 per cent) than the high distress victims (49 per cent).

Non (or partly) recovered victims held more negative views of the offender and how their case was handled compared to the recovered victims. They were significantly more likely to see the offender as a "bad" person rather than a "good" person who had done a bad thing, less satisfied by how their case was handled, and more likely to say they wished their case had gone to court. When asked what was the most important thing hindering their recovery, 74 per cent of the non (or partly) recovered victims cited financial losses, injuries, and emotional harms arising from the offence.

These findings on victim distress and recovery pose significant challenges to the RJ field. They invite reflection on the variable effects of victimization for the ways in which victims orient themselves to a restorative process. For the high distress victims, it was harder to act restoratively at the conference, and it was more difficult to be generous to offenders. The effects of victimization did not end with the conference, but continued to linger for a long time. A process like RJ, and indeed any legal process (such as court) may do little to assist victims who have been deeply affected by crime. Improving practices by conference facilitators may help at the edges, but this too is unlikely to have a major impact. Victims who are affected negatively and deeply by crime need more than RJ (or court) to recover from their victimization.

Limit (6). We should expect modest results, not the nirvana story of RJ.

The nirvana story of RJ is illustrated by Jim Consedine (1995 p.9), who opens his book by excerpting from a 1993 New Zealand news story:

The families of two South Auckland boys, killed by a car, welcomed the accused driver yesterday with open arms and forgiveness. The young man, who gave himself up to the police yesterday morning, apologised to the families and was ceremonially reunited with the Tongan and Samoan communities at a special service last night.

The 20-year old Samoan visited the Tongan families after his court appearance to apologise for the deaths of the two children … The Tongan and Samoan communities … later gathered at the Tongan Methodist Church in a service of reconciliation. The young man sat at the feast table flanked by the mothers of the dead boys.

Later, in discussing the case, Consedine sees it as "ample evidence of the power that healing and forgiveness can play in our daily lives. ... The grieving Tongan and Samoan communities simply embraced the young driver ... and forgave him. His deep shame, his fear, his sorrow, his alienation from the community was resolved" (Consedine, 1995 p.162).

This nirvana story of RJ contains elements that are not likely to be present in most RJ encounters: it was composed of members of racial-ethnic minority groups, who were drawn together with a shared experience of church, and there appeared to be "meso-social structures" and "thick" social ties between the families and kin of the offender and victims. These *gemeinschaft* qualities are atypical in modern urban life, and thus, we should expect "modest and patchy results" (Bottoms, 2003 p.110) to be the norm, not the exception. Much depends on the capacities and orientations of offenders and victims to be empathetic or to understand the other's situation; on the degree to which offenders are genuinely sorry for what they have done and can communicate their remorse effectively. It also depends on the character of the victimization itself and how deeply it affects victims. All of these elements are largely outside the control of facilitators or other professionals, who are in a position only to coordinate, guide, or encourage such processes. We must also recognize the limits of time and resources that can be put to RJ processes. Some propose, for example, that with better preparation, RJ conferences will go more smoothly and achieve intended results. This may well be true, but it sets up a policy question: does one put a lot of resources (including more time in preparation) in a fewer number of RJ encounters, or does one attempt to apply RJ as

widely and broadly as possible? We should not assume that the nirvana story of RJ is typical, nor that it can be achieved often.[10] This sets up RJ to fail with unrealistic and too high expectations.

CONCLUSION

That there exist limits on what RJ can achieve should not be grounds for dispensing with it, nor for being disillusioned, once again, with a new justice idea. My reading of the evidence is that face-to-face encounters between victims and offenders and their supporters *is* a practice worth maintaining, and perhaps enlarging, although we cannot expect it to deliver strong stories of repair and goodwill most of the time.

In the penalty phase of the criminal process, both RJ and the established court process have limits. RJ is limited by the abilities and interests of offenders and victims to think and act in ways we may define as restorative. Established CJ is limited by the inability of formal legality to listen to the accounts of crime and their effects by those most directly involved. Legal professionals do the talking, and what is legally or administratively relevant takes precedence.

By recognizing the limits of both RJ and established CJ in the penalty (or post-penalty) phase of the criminal process, we more effectively grasp the nettle of justice as a promise, as something that may be partly, but never fully realized. As such, we see that all justice practices, including RJ, are limited.

ENDNOTES

[1] My thanks to Brigitte Bouhours for her assistance in preparing this chapter.

[2] In inquisitorial criminal justice processes, a judge takes a more active role in gathering evidence and questioning witnesses and defendants; but in these systems as well, a defendant has a right to deny committing the offence.

[3] Bottoms (2003 pp.91-2) takes care to discuss the varied expression of dispute-resolution in pre-modern societies.

[4] Researchers use different measures to tap restorativeness. For example, in the Re-Integrative Shaming Experiments (RISE), restorative justice for offenders was defined as the opportunity to repair the harm they had caused, and for victims, it was defined as recovery from anger and embarrassment. In the SAJJ project, restorativeness was measured by items that tapped the *degree and quality of interaction* between victims, offenders, and their supporters.

[5] For some offences, it may be the wrong starting point. As Acorn (2004 p.73) points out in the context of partner abuse, "the skill of contrite apology is routinely practiced by abusers," but it can serve to perpetuate a cycle of violence.

[6] Parallel with the experiential dynamics (or interactional features), Bottoms (2003 pp.94-8) also considers the social structural context of an apology, which I do not address here.

[7] The per cents are of a sub-set of 47 conference cases, in which victims were present at the conference and both the victim and offender were interviewed in 1999.

[8] This group was evenly divided between those who agreed that the offender was really sorry (18 per cent) or was somewhat sorry (16 per cent).

[9] This set of items, adapted from a RISE instrument, asked the victim to consider the period of time after the incident and before the conference, whether they had suffered from the following: fear of being alone, sleeplessness or nightmares, general health problems, worry about the security of their property, general increase in suspicion or distrust, sensitivity to particular sounds or noises, loss of self-confidence, loss of self-esteem, and other problems. Each of these items was asked separately for the conference victims, and in a more summary form for the victims who did not attend the conference (see Daly et al., 1998).

[10] In fact, some argue that the "utopian vision" of RJ ("where every story of violation and loss ends happily in right-relation") is itself misguided and wrong (Acorn, 2004 p.162).

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