

# RESTORATIVE JUSTICE

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Edited by  
Carolyn Hoyle

CRITICAL CONCEPTS IN  
CRIMINOLOGY



# RESTORATIVE JUSTICE

Critical Concepts in Criminology

*Edited by  
Carolyn Hoyle*

**Volume II**  
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## Part 4

# RESTORATIVE RESPONSES WITHIN THE CRIMINAL JUSTICE SYSTEM



# STAGING RESTORATIVE JUSTICE ENCOUNTERS AGAINST A CRIMINAL JUSTICE BACKDROP

A dramaturgical analysis

*James Dignan, Anne Atkinson, Helen Atkinson, Marie Howes,  
Jennifer Johnstone, Gwen Robinson, Joanna Shapland and  
Angela Sorsby*

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## Abstract

Drawing from an ongoing evaluation of three major restorative justice schemes in England and Wales, the article employs a dramaturgical perspective to examine a number of process issues that arise when restorative justice processes are deployed within a criminal justice context. They include the rôle and identity of restorative justice facilitators, the locations for restorative justice encounters and associated matters relating to the values of privacy, openness and accountability.

## ‘All the world’s a stage’<sup>1</sup>

It is customary for conventional criminal trials to be depicted and represented as dramatic events, at any rate for onlookers. In reality, however, this is true only of a relatively small proportion of contested trials in the Crown Court, which are themselves a statistical rarity.<sup>2</sup> Moreover, even in cases such as these, all too often the ‘key players’ are consigned to relatively minor rôles. In the case of defendants, as generations of critical legal scholars have pointed out, theirs is usually little more than a ‘walk-on’ part since it is largely left up to their legal representative to present their case and speak on their behalf. Unrepresented defendants also tend to say little (Shapland, 1981). As for victims, they are all too frequently liable to

be written out of the script entirely and heard from, if at all, merely as 'voices off'. Even in those rare cases where they are called as witnesses they are unlikely to be given an opportunity to 'have their say' using their own words to express those aspects of the case that matter most to them.

Restorative justice, on the other hand, is usually praised (e.g. Strang, 2002) for being far more inclusive and participative but—perhaps because it has usually been conducted behind closed doors—its dramatic characteristics and potential have seldom been highlighted,<sup>3</sup> despite the widely acknowledged emotional nature of many restorative justice encounters (Harris et al., 2004). Our interest in these matters stems from our ongoing evaluation of three restorative justice schemes<sup>4</sup> that operate as an integral part of the regular criminal justice process. The cases they deal with originate at various 'formal' decision points from cautioning to sentencing, though they also include offenders who are serving sentences either in prison or in the community. A substantial proportion of the cases involve adult offenders, many of whom have committed serious offences such as robbery, grievous bodily harm or burglary.

In this article we examine some of the justice process issues<sup>5</sup> that need to be addressed when restorative justice encounters are staged, not as part of a free-standing dispute resolution process, but against a backdrop of criminal justice procedures, expectations, values and consequences. Such a setting imposes a number of constraints on the way restorative justice is performed and, as others have commented (Zehr, 1995: 222), it potentially introduces a number of tensions. Our primary aim in this article is to identify some of those tensions and to describe how they have been handled by the 'cast of actors' in the restorative justice encounters that we have been observing as part of the continuing evaluation. Our recourse to theatrical imagery throughout this article is not simply a stylistic device, but reflects our conviction that it helps to illuminate a number of important issues that might otherwise be overlooked or taken for granted.

In using such a framework, however, we are not suggesting that participants in restorative justice are merely 'acting' rôles, which do not reflect their own experiences and perceptions. The offences with which restorative justice deals are real events, causing very real effects and consequences for both victims and offenders. All participants will of course be presenting their own views—that is the essence of restorative justice—though there may be differences in the spontaneity and sincerity with which some of these views are conveyed, as there are in all social encounters. In using the theatrical metaphor, we are suggesting restorative justice may be likened to a reality-based documentary, not a fictional representation. In this, restorative justice is different from criminal justice. Most of the dominant players in criminal justice (judge, prosecutor, defence lawyer) perform *occupational* rôles and are necessarily detached from the events to which the cases in which they are professionally engaged relate. In restorative justice the rôles of the main participants usually relate directly to an event that happened in the course of their everyday lives and activities and in which they were personally involved.

We have described elsewhere (Shapland et al., 2006a) the tasks of restorative justice, which encompass both the goals towards which restorative justice aspires, at least when performed within a criminal justice context, and also the 'content' or outcomes of such restorative justice encounters such as conferences or direct mediations.<sup>6</sup> In this article we focus on various dramaturgical aspects of the 'performance' in which they are engaged. We begin by considering some of the 'organizational aspects' relating to such encounters, including the rôle and identity of the convenor and also the settings in which they are conducted. We then turn to a hitherto somewhat neglected aspect of restorative justice processes: whether or not they should be open to the public; and whether some form of public record should be made of the encounter in the interests of accountability. Throughout the article an important sub-text is whether it is possible for the tensions to be resolved without either criminal justice or restorative justice values being unacceptably compromised or even fatally undermined. But first we need to set the scene for the following discussion.

### Staging restorative justice encounters: the '*mise en scène*'

Howard Zehr has likened the administration of conventional criminal justice to 'a kind of theatre in which issues of guilt and innocence predominate. The trial or guilty plea forms the dramatic centre, with the sentence as a denouement' (1995: 72). Other writers, both American (e.g. Garfinkel, 1956; Harbinger, 1971) and British (e.g. Carlen, 1976a, 1976b), have also resorted to dramaturgical imagery when analysing courtroom encounters in the context of criminal trial proceedings. Dramaturgical analysis of the 'denouement' itself, the sentencing process and its aftermath, with which court-based restorative justice processes are more properly to be compared is rarer (but see Foucault, 1977: 113; Spierenburg, 1984). Likewise, very few commentators have adopted this perspective when analysing restorative justice encounters, which is somewhat surprising in view of the much more prominent rôles that are assigned to the key players in such proceedings compared with their conventional criminal justice counterparts. In conferences and also direct mediation, victims and offenders are central in saying what happened, what effects have been caused and what might happen in the future. In the conferences we evaluated, victims, offenders and facilitators spoke for about the same proportion of time, with other supporters having a slightly smaller rôle (Shapland et al., 2006b).

To paraphrase Zehr (1995), restorative justice processes can also be seen as a kind of theatre, but one in which the spotlight focuses, not on issues relating to guilt or innocence, but on the dénouement (or outcome) and the restorative justice encounter through which it unfolds. In analysing restorative justice encounters from a dramaturgical perspective, a number of key elements are likely to have an effect on the encounter itself. They include not just the parts played by members of 'the cast' (victim, offender, their supporters, facilitator) and whether they are 'scripted' or 'ad-libbed', but also those of the 'back-stage' production team,

the 'setting' for the performance and the 'audience' if any. However, it is worth reiterating that the key element for the purposes of this article concerns the consequences—both for the parties and also for the process itself—of staging restorative justice encounters against a criminal justice backdrop. We will begin by discussing 'the staging' of restorative justice encounters before considering whether they should take place in the presence of 'an audience' or, alternatively, whether an account of the encounter should be relayed to other interested parties.

### **'Producing' and 'directing' restorative justice encounters**

The 'theatre' in which criminal justice is performed is highly professionalized, and the rôles that are assumed by the various professional 'actors' are notably compartmentalized, differentiated and specialized, leaving little scope for any meaningful participation by non-professionals (Rock, 1993). Restorative justice, by contrast, has often been portrayed by its advocates as an exercise in amateur dramatics, in which the parties themselves take 'centre stage' in the unfolding drama, leaving little scope for, or indeed need of, professional 'experts'.<sup>7</sup> What happens when restorative justice is staged and performed against a criminal justice backdrop, however, raises a number of important and hitherto somewhat neglected questions regarding the identity and rôles of the criminal justice professionals who will perform still be involved at least to some extent in the process (Olson and Dzur, 2004).

We will look first at the 'back-stage' functions that need to be performed before any restorative justice encounter can take place, and then at the 'onstage' functions of whoever presides over any ensuing meeting. The most important of the back-stage functions are the selection of the 'cast', the allocation of rôles to the various performers and the selection of a suitable venue, though another important function involves the preparation of the parties for their encounter. The on-stage functions will almost certainly be the responsibility of the facilitator or convenor, though there may be more than one such person, who will almost inevitably be expected to discharge a number of different rôles. Practice with regard to the number of facilitators we observed varied somewhat. The mean number of facilitators at conferencing encounters was two (1.83), though there could be as many as four (Shapland et al., 2006b). In cases with more than one facilitator, there was usually a degree of 'rôle differentiation', with the second person taking on a supporting rôle. This might entail helping to prepare participants for the conference, acting as 'supporter' for one of the parties, dispensing refreshments at the end of the conference or writing up the report that would be sent to the court. The one scheme that routinely used mediation rather than conferencing (Remedi) had a policy of employing two mediators.

### ***'Back-stage issues': 'casting', 'rehearsals' and 'venue'***

One important preliminary back-stage issue relates to the size and composition of 'the cast', which also has important implications for the nature of the restorative

justice proceedings themselves. We will have more to say about this in the section on privacy and openness. Here we will concentrate on the tasks of preparing members of the cast for their restorative justice encounter and assigning them to their rôles in the 'performance'.

A key backstage task for those responsible for preparing parties for their encounter lies in managing the expectations of the different sets of 'actors', which is somewhat analogous to the rehearsal process in a dramatic production. Different types of restorative justice process are known to vary in the degree of preparation that is considered appropriate (Dignan and Lowey, 2000: 24, 30; Dignan, 2005: 112, 118). Some early British restorative justice initiatives were criticized for inappropriately 'coaching' participants prior to the meeting in what they should say or how they should perform (see, for example, Davis, 1992: 94; Marshall, 1999: 17). Participants' views on how adequately they were prepared for their encounters in our own evaluation will be dealt with in the third evaluation report.

In criminal justice, the rôles of offender and victim are normally allocated well before the stage of conviction and sentence (Shapland et al., 2006a), through the processes of arrest, charge, prosecution and guilty plea (or admission of guilt prior to a diversionary penalty) or verdict. With some types of cases, however, it may be extremely difficult for criminal justice professionals to apportion blame accurately and appropriately and so definitively assign 'victim' and 'offender' status on a non-arbitrary basis. This is often the case with certain public order incidents, or offences involving violent 'brawls', in which there may be an element of 'blame' attaching to several, or even all of, the parties, regardless of the way the incident is subsequently characterized by the police and other criminal justice professionals. Such cases are apt to be problematic however they are dealt with. However, they are liable to pose particular problems within a restorative justice context, which depends on an offender admitting at least some responsibility for an offence and, where this is not the case, the process can easily fall apart.

Offences of this kind were also included within the referral criteria for the schemes we have been evaluating. And it is interesting to note that in a number of adult caution cases, in particular, the offender held others—sometimes including the person who was described as 'the victim'—to have been either partly or wholly responsible for the fight in which they had been involved. Some of these appeared to us as observers to be among the least satisfactory of the restorative justice encounters that we witnessed, and they included the handful that were terminated by the facilitator. The problem in such cases is that responsibility for the wrongdoing may well be shared among several of those present (and some who may not have been invited to attend) irrespective of the rôles to which they may formally have been assigned (see Shapland et al., 2006b). Criminal justice tends to gloss over such niceties by concentrating, for example, on a particular set of incidents or a sliver of time in which a specific episode took place without adequate regard to the context in which they occurred. Normal social interaction tends to take a more nuanced view, and it is important for restorative processes also to allow participants to feel that they have been able to say what they wished to without



the issues being inexorably prejudged. Some restorative justice processes (those operating in a non-criminal justice community mediation context, for example) do operate on a non-judgemental basis, though this is unlikely to be the case where they are deployed in a criminal justice context.

Another potentially problematic category of cases, albeit for different reasons, concerns those relating to public order incidents in which the principal complainant is likely to be a police officer, who then becomes a party to the proceedings. Examples include cases arising out of drunken or abusive behaviour, or public order altercations in which the police often find themselves embroiled, though we are not including in this category cases where police officers are directly assaulted and injured. One reason why such 'public order' cases are problematic from a restorative justice perspective relates to the absence of a 'conventional' victim and the artificiality that is often involved when a police officer assumes this rôle. A second factor that renders them potentially even more problematic, however, is where the facilitator who is responsible for convening a case is also a police officer or a representative of a related criminal justice agency. The problem this raises relates to the risk of partisanship in the way the proceedings are conducted and the need for effective mechanisms to review and rectify any incorrect or unjust decisions. The problem becomes particularly acute when decisions that are taken by criminal justice officials are relatively 'invisible' and thus less susceptible to any form of judicial review, which is often the case when cases are 'diverted' from the normal criminal justice process to some less formal alternative. This need for mechanisms of accountability and judicial oversight is an issue to which we will return when discussing the identity and rôle of facilitators more generally.

Apart from the 'casting' process, another important preparatory backstage decision relates to the venue for any restorative justice encounter. Many restorative justice theorists favour a neutral public space for this purpose, such as a community hall, in order to avoid 'putting one party at a disadvantage' (Wright, 1998: 199; see also Roche, 2003: 137–8).<sup>8</sup> Where restorative justice encounters are staged in a criminal justice setting, however, the choice of venue is likely to be determined by rather different considerations including those relating to cost, administrative convenience and (particularly where they involve serious offences) the safety of the participants. In the restorative justice encounters that we have observed, for example, most of which involved adult offenders, the great majority of them were held in facilities provided by criminal justice agencies such as prisons (48%) and police stations (35%). Does this matter?

Where the cases that are referred to restorative justice involve very serious offences, as with many in our own evaluation, the personal safety of the participants clearly has to be a paramount consideration, and in some cases this may necessitate a high security environment such as a prison. Such venues are likely to be intimidating for many victims, however. Consequently, even where there is no alternative to a prison setting, every effort should be made to find a suitable location within the prison in which, as far as possible at such a