

# RESTORATIVE JUSTICE AND THE PRE- CONDITIONS FOR GRACE: TAKING VICTIM'S NEEDS SERIOUSLY

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## I. INTRODUCTION

Eight years after Hutus in Rwanda massacred Tutsis in a chillingly orchestrated burst of savagery, an American filmmaker flew to Kigali to record the country's effort to knit together its fractured people. She chose a dramatic moment. After years of languishing in local jails, Hutus who had participated in local justice tribunals and confessed to various crimes were being released and sent home to farm, build, eat and pray with those whose families and homes they had decimated.<sup>1</sup>

The film, *In Rwanda We Say . . . The Family that Does not Speak Dies*, sought to gauge Tutsi villagers' reactions to the release of their former neighbors and to probe the workings of Rwanda's bold experiment with restorative justice. The final scene closes with a Hollywoodish promise of healing and redemption. But there are plenty of penultimate moments that don't leave much room for hope – at least not for the most deeply scarred of Rwanda's survivors.

The voices of the women – those who have buried their husbands, sisters, brothers or children – are particularly haunting. When asked, “How do you feel about the return of your Hutu neighbors?” a woman in a red dress answered, “Well, how should we feel? Those who killed our family and livestock – we're supposed to welcome them back and live with them, but their children have milk and mine have none?” When two older women are asked, “Will you speak to those coming home from the jails?” they respond,

Well, they're coming back and we can't stop them. We won't stop them. Why should we stop them? They have already killed

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<sup>1</sup> IN RWANDA WE SAY . . . THE FAMILY THAT DOES NOT SPEAK DIES (Dominant 2004) [hereinafter IN RWANDA].

our children and left us to wander by day and lie awake at night. We are ghosts. We're already dead. Why don't they just come back and finish the job?<sup>2</sup>

The question of how best to address the needs of victims – victims of minor crime as well as gross atrocities – is a point of profound disagreement between retributive and restorative justice theorists. Retributivists hold that victims crave revenge; that they need to see the offender punished before they can feel that the toppled moral order of their world has been set right.<sup>3</sup> Restorativists maintain that victims need other things entirely – acknowledgment, recognition, participation in truth-seeking activities, information, apology, reparations and other confirmations of efficacy and self-worth.<sup>4</sup>

But the needs of the Rwandan women seem not to fall into either category. When asked about the Hutus' return, they display, in turn, skepticism, anger and fear. But most often they project indifference. The women who say they are ghosts seem careless of the future. They speak flatly and without affect. They are the picture of depression.<sup>5</sup> “Restorative justice,” “transitional justice,” and “inter-ethnic reconciliation” are words without meaning. What relevance can reparative processes have for people who have given up on the future?

Equally dogmatic in describing the anatomy of a wounded soul, both restorativists and retributivists tend to present their view of victim need as self-evident, and not as speculation requiring empirical support. In a book-length critique of restorative justice, Annalise Acorn complains that restorative justice “tells us the same predictable story” of offender remorse, victim forgiveness, and a sunset of harmony and justice<sup>6</sup> “over and over again.”<sup>7</sup> And retributive justice theorists can be subject to the same complaint. The retributivist paradigm accepts victim hunger for offender pun-

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<sup>2</sup> See *id.*

<sup>3</sup> See JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 2 (1988).

<sup>4</sup> See HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 14–15 (2002). See also Heather Strang & Lawrence W. Sherman, *The Practice of Restorative Justice: Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15 (2003).

<sup>5</sup> See *IN RWANDA*, *supra* note 1.

<sup>6</sup> See Ada Melton, *Indigenous Justice Systems and Tribal Society*, in *JUSTICE AS HEALING* 108, 108–109 (2001) (describing the indigenous justice paradigm as one in which “[t]he victim is the focal point, and the goal is to heal and renew the victim’s physical, emotional, mental, and spiritual well-being. It also involves deliberate acts by the offender to regain dignity and trust, and to return to a healthy physical, emotional, mental, and spiritual state.”).

<sup>7</sup> ANNALISE ACORN, *COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE* 160–161 (2004).

ishment as a psychological fact so obvious that it requires no buttress from on-the-ground inquiry.<sup>8</sup>

This essay surveys the question of victim need from a different vantage point. It takes as its starting point the voices of actual victims as recorded by researchers in the field. It reports on three studies and the linkage they uncover between victim distress and attitudes toward justice and reconciliation. What they reveal belies a simple notion of victim need and suggests that restorativists should move warily as they seek to reshape the criminal justice system into more harmony-producing forms. Victim-offender encounters, truth-telling, and moves toward apology and reconciliation are appealing in the abstract; but data suggests that victims whose distress levels remain high and who continue to suffer the psychological fallout of intense trauma may be unable to benefit from such interactions. Victims of serious crime and violation may need more tangible help – psychological counseling and assistance with the material basics of life – before they can be expected to dispense the spiritual balm and experience the psychological release that restorative theorists envision.

## II. DATA POINTS FROM TWO WAR ZONES – RWANDA AND BOSNIA/HERZEGOVINA/CROATIA

### A. Rwanda

The unhappy facts of Rwanda's bloodshed are well known. In the spring of 1994, the country was gripped by a genocidal madness that left over 800,000 people dead<sup>9</sup> and nearly 130,000 alleged perpetrators behind bars.<sup>10</sup> In addition to the incalculable human loss, most of Rwanda's basic infrastructure – including its legal system – was left in shambles. Only five Rwandan judges survived the genocide.<sup>11</sup> Because of the lack of qualified judges and glut of defendants, only 7,000 of the alleged participants in the genocide had

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<sup>8</sup> See MURPHY, *supra* note 3.

<sup>9</sup> U.N. Security Council, *Report of the Independent Inquiry Into the Actions of the United Nations During the 1994 Genocide in Rwanda*, at 3, U.N. Doc. S/1999/1257 (1999).

<sup>10</sup> U.S. Department of State, 1999 Country Reports on Human Rights Practices, Rwanda, Introduction (2000), available at <http://www.state.gov/g/drl/rls/hrrpt/1999/266.htm>.

<sup>11</sup> Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355, 367–68 (2002).

been tried for their crimes as of 2005.<sup>12</sup> While international criminal courts prosecuted the masterminds behind the ethnic cleansing,<sup>13</sup> Rwanda's local courts implemented a judicial program, called Inkiko Gacaca, to try the many thousands of foot soldiers implicated in the war against the Tutsis.<sup>14</sup>

Drawing on pre-colonial traditions of participatory and restorative justice, Gacaca refers to the grassy area where local residents would meet to deal with disputes.<sup>15</sup> Gacaca tribunals of old would elicit facts about alleged breaches and offenses, draw out the narratives of victims, offenders, and witnesses alike, and decide as a community what should be done. As constituted in the wake of genocide, Inkiko Gacaca had several goals: To establish the truth of what happened during the three month slaughter, to provide victims an opportunity to confront their tormentors and tell their story, and to bring confessed perpetrators back into the fold. Although the Inkiko Gacaca judges were empowered to hand down prison sentences, Inkiko Gacaca's primary goal was not to deliver punishment. Rather, it sought to reaffirm the existence of transgressed social norms, bring shattered communities together in a common search for the truth, and to integrate chastened offenders into a strengthened social network.<sup>16</sup>

Victims played two roles in this process. They were expected to indict and forgive, to impose shame and bestow grace. It was hoped that once victims had the chance to confront offenders and extract an apology, they would be better able to leave the past behind and coexist peacefully with those who had left them nursing grievous losses.<sup>17</sup>

In 2002, the same year that *The Family Who Does Not Speak Dies* was made, medical researchers traveled to Rwanda to explore the degree of faith and confidence Rwanda's wounded population had in inter-ethnic reconciliation, norms of non-violence, and the restorative justice ideals undergirding the practice of Inkiko Ga-

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<sup>12</sup> Sarah L. Wells, *Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda*, 14 S. CAL. REV. L. & WOMEN'S STUD. 167, 168-69 (2005).

<sup>13</sup> See U.N. SCOR, 49th Sess., 3453 mtg. at 8, U.N. Doc. S/RES/955 (Nov. 11, 1994) (stating that the Security Council "[d]ecides . . . to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda.").

<sup>14</sup> Daly, *supra* note 11, at 356.

<sup>15</sup> *Id.*

<sup>16</sup> See *id.* at 378.

<sup>17</sup> See Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, J. DISP. RESOL. 355, 382-383 (2004).

caca.<sup>18</sup> The study examined the connection between attitudes toward the International Criminal Tribunal of Rwanda (ICTR), Inkiko Gacaca, reconciliation, ethnic interdependence, nonviolence, social justice, and the experience of trauma.<sup>19</sup> Respondents were asked if they had suffered serious injury or sexual violence, the death or serious injury of a loved one, or forced eviction or property loss.<sup>20</sup> Additionally, respondents were given a checklist of symptoms to mark the prevalence of post-traumatic stress disorder (PTSD).<sup>21</sup>

To gauge respondent attitudes toward the ICTR and Gacaca, researchers devised a six-point Likert scale measuring levels of agreement with statements expressing confidence or disillusionment with the tribunals.<sup>22</sup> Attitudes toward ethnic integration and interdependence were similarly probed.<sup>23</sup>

As the researchers concluded, the Rwandan survey “led to a number of interesting and provocative observations.”<sup>24</sup> First, the study found that symptoms of PTSD and material instability damp-

<sup>18</sup> See Phuong N. Pham et al., *Trauma and PTSD Symptoms in Rwanda*, 292 JAMA 602-12 (2004). See also Timothy Longman et al., *Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda*, in MY NEIGHBOR, MY ENEMY 206 (Stover & Weinstein eds., 2004).

<sup>19</sup> See Pham, *supra* note 18. See also Longman, *supra* note 18, at 212–222.

<sup>20</sup> See *id.* at 212.

<sup>21</sup> See *id.* at 207; see also Pham, *supra* note 12, at 604. Symptoms of PTSD include exaggerated startled reflex, sleeplessness, nightmares, chronic sense of hopelessness, and loss of appetite. See AMERICAN PSYCHIATRIC ASS'N, *Diagnostic and Statistical Manual of Mental Disorders* 468 (4th ed. 1994).

<sup>22</sup> Longman, *supra* note 18, at 214–217. Representative statements included:

- Overall, the Arusha Tribunal (ICTR) has functioned well.
- The Arusha Tribunal is nothing but victor's justice.
- The genocide trials in the Rwandan tribunals are fair to all ethnic groups.
- The trial of genocide suspects has taken too long.
- Rwandan tribunals are promoting reconciliation.
- The election of gacaca judges was conducted fairly in my community.
- I am concerned that the gacaca judges are not well-qualified.
- Community service is a good alternative to imprisonment.
- I have confidence in the gacaca process.

*Id.*

<sup>23</sup> See *id.* at 220. Ethic integration was assessed by statements such as:

- When I have a problem, I usually go for help to someone from my own ethnic group.
- People must learn to live together and depend on each other, no matter what their ethnic group.
- Every ethnic group should have the same opportunity to find work.
- I prefer to buy things from a shopkeeper of my own ethnicity.
- Forgiveness is important to reconciliation.

*Id.*

<sup>24</sup> See *id.* at 219.

ened enthusiasm for restorative procedures and reconciliation. Respondents with Post Traumatic Stress Disorder (PTSD) and those whose economic situation had worsened since 1994 were less likely to have positive attitudes toward Inkiko Gacaca and were less likely to believe in community, ethnic interdependence, and nonviolence. Respondents without PTSD and those whose economic situation had improved since 1994 were more likely to support Gacaca, reconciliation, and ethnic interdependence.<sup>25</sup>

The study also looked at the effect of cumulative exposure to traumatic events. It found exposure to cumulative trauma correlated with negative attitudes toward indigenous and restorative solutions like Gacaca and the Rwandan trials. While only a minority of all respondents expressed support for the largely retributive ICTR, those with cumulative traumatic exposure<sup>26</sup> were more likely to be among its enthusiasts. Like the presence of PTSD, cumulative traumatic exposure was associated with a negative attitude toward nonviolence, community, and interdependence.<sup>27</sup>

## B. Croatia

A similarly structured study was conducted in three war-torn cities in the region of Croatia, Bosnia and Herzegovina. Vukovar, Mostar and Prijedor all saw fierce fighting during the Serbian-Croatian conflict of the early 1990's. In 2000-2001, researchers interviewed residents to investigate their attitudes toward war crimes, the functioning of the war crime tribunal investigating the atrocities that occurred in the former Yugoslavia (ICTY), and the possibility for inter-ethnic reconciliation and community. As in the Rwanda study, survey respondents were asked about their experiences with trauma. Unsurprisingly, a large percentage of the sample had endured a number of emotionally searing events. More than one-third of the respondents in Vukovar and Prijedor had lost their homes and fifteen percent of the entire sample had lost a member of their family during the ethnically driven killing sprees.

Respondents were asked a series of questions about their experiences with, and attitudes toward, different or "opposing" na-

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<sup>25</sup> See Pham, *supra* note 18, at 608-10.

<sup>26</sup> See *id.* at 604 ("[p]roperty destroyed or lost, being forced to flee, serious illness, a close family member killed, a close family member died from illness, sexual violence, and physical injury" were indicators of cumulative traumatic exposure).

<sup>27</sup> See *id.* at 608-609.

tionalities and their confidence in inter-ethnic bonding and interdependence. Members of each ethnic group were asked, "Have you, as a [Croat, Bosnian, Serb] had any positive experience with other nation [ethnicity] after the war?" and, "Have you as a [Croat, Bosnian, Serb] had any negative experience with other nations before the war?" Additionally, members of each group were asked if they had suffered discrimination at the hands of a member of another ethnic group either before or after the war.<sup>28</sup> The respondents' levels of ethnocentrism were measured by reactions to ethnic stereotypes – both positive and negative. Croats were presented with statements like, "Serbs are hospitable" or "Serbs are perfidious" and asked to record their level of agreement or disagreement. Croats were also presented with similar stereotypes of Bosnians, and Serbs with stereotypes of Croats and Bosnians.<sup>29</sup> Attitudes toward the possibility of reconciliation were measured by asking respondents whether they would be willing to include a member of an "opposing" group in their family, workplace, sport-team, or recreational circle.<sup>30</sup>

The results tracked some of the findings from the Rwandan study. War trauma combined with traumatic experiences involving opposing ethnic groups was a potent one-two punch to faith in reconciliation. Although not a dispositive feature on its own, trauma "in combination with the feeling of being discriminated against by the opposing group and/or with a series of negative experiences with that group" became a serious impediment to faith in effective ethnic interchange.<sup>31</sup>

### C. Forgiveness Through Maslow's Lens.

What do these results mean? They are open to multiple interpretations, but one fact seems clear; victim trauma matters. PTSD symptomatology is inversely related to faith in restorative processes. War trauma intertwined with negative exposure to op-

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<sup>28</sup> See Miklos Biro et al., *Attitudes Toward Justice and Social Reconstruction in Bosnia and Herzegovina and Croatia*, in *MY NEIGHBOR, MY ENEMY* 183, 198 (Stover & Weinstein eds., 2004).

<sup>29</sup> See *id.* at 191, Table 9.1 (stating that positive stereotypes included: "Croats are clean," "Bosnians are hospitable," "Serbs are hardworking," and "Croats are civilized." Negative stereotypes included, "Croats don't like other nations," "Bosnians are perfidious," "Serbs are perfidious," and "Croats are dirty.").

<sup>30</sup> See *id.* at 197.

<sup>31</sup> See *id.* at 199.

posing ethnic groups makes it harder to imagine reaching out to “the other” who has been a source of pain. The women in Rwanda who balk at forgiving the returning Hutus provide us another piece of information. They reference their own wants and deprivations – be it a shortage of milk or a roof to cover their heads – as part of what keeps them in an unforgiving frame.<sup>32</sup>

Why do emotional trauma and physical deprivation make it so much harder to forgive? Abraham Maslow, the psychologist most famous for his theory of instinctual needs, hypothesized that all individuals have needs that exist on a continuum of urgency or importance.<sup>33</sup> This continuum could be diagrammed as a pyramid – with the most exigent needs balancing out the bottom layer of the pyramid.

Satisfaction of the bottom-layer physiological needs, Maslow postulated, allows energy to be diverted to the higher level needs.<sup>34</sup> Moving up the pyramid, one moves away from needs essential to physical integrity toward needs that satisfy a psychological or spiritual hunger.<sup>35</sup> At the very top of the pyramid sits the human impulse toward self-actualization – the push to be as fully aware, creative and authentic as possible.<sup>36</sup> But Maslow believed that this spiritual height can only occur when lower level needs have been met.

Transposing Maslow’s structure onto the data sets from Rwanda and Bosnia and Herzegovina, we might conclude that individuals who have been deeply traumatized and remain in a state of economic and psychic deprivation are probably still trying to satisfy Maslow’s lower-level needs.<sup>37</sup> They are looking to feel safe, secure, and intact – to ensure that they have food and shelter for themselves and their families. At higher levels of functioning they are looking to regain self-esteem and a sense of efficacy (Stage 3 in the Maslow Hierarchy).<sup>38</sup> Generating empathy, offering forgiveness, and extending a trusting hand to a former enemy are sophisticated and generous psychological gestures. Schematically, we might put these functions at the highest level of Maslow’s pyramid

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<sup>32</sup> See IN RWANDA, *supra* note 1.

<sup>33</sup> Abraham Maslow, *A Theory of Human Motivation*, PSYCHOLOGICAL REVIEW 50, 370-396 (1943), available at <http://psychclassics.yorku.ca/Maslow/motivation.htm> (last visited July 15, 2007).

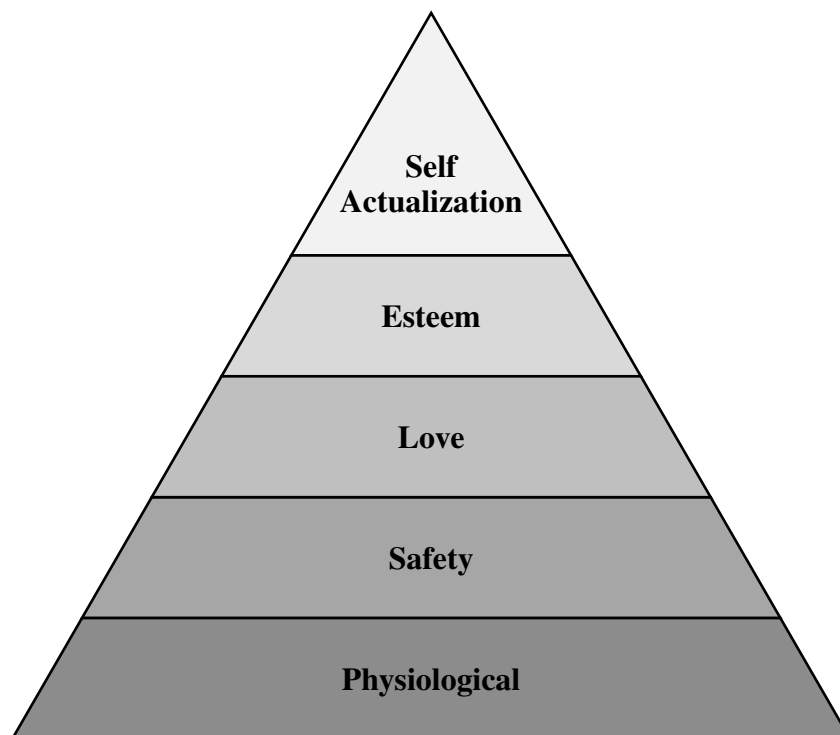
<sup>34</sup> See *id.* at 373–374.

<sup>35</sup> See *id.* at 375.

<sup>36</sup> See *id.* at 382–383.

<sup>37</sup> See *id.* at 372–375.

<sup>38</sup> See *id.* at 381–382.



– in the same realm as moves toward spiritual fulfillment, creative work and problem solving.

Restorative justice theorists assume that victims of crime are perched at the highest point of Maslow's hierarchy.<sup>39</sup> But the data from Rwanda and Bosnia and Herzegovina/Croatia belies this assumption. The researchers' discovery that trauma adversely affects belief in reconciliation and interdependence suggests that not all victims can perform the emotive and cognitive tasks that restorative justice procedures require.

It may be argued that this data – coming as it does from people brutalized by staggering paroxysms of violence – tells us little about how restorative justice procedures might work with victims of lesser crimes. But the next section, which reviews data from a victim-offender program handling relatively minor offenses, suggests that the lessons are more transferable than we might think.

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<sup>39</sup> See Zehr, *supra* note 4, at 13–15.

### III. TRAUMA AND RECONCILIATION – A STUBBORNLY NEGATIVE CORRELATION

#### A. South Australian Juvenile Justice Project

Evidence exists suggesting that victims of criminal activity far less grievous than genocide may nonetheless suffer from distress levels that impede active engagement in restorative processes. The South Australian Juvenile Justice Project (SAJJ) examined conferencing between juvenile offenders and their victims. “Conferencing” has been used over the past decade in Australia, New Zealand, England, and the United States as an alternative to traditional retributive responses to youth offenders.<sup>40</sup> The conferencing system studied by SAJJ was created as part of a statutory overhaul of the South Australian youth justice system.<sup>41</sup> Under the Young Offenders Act of 1993, a “minor” criminal offense committed by a juvenile between the ages of ten and seventeen can be referred to a conference by a police officer.<sup>42</sup> Whether an offense is referred to conferencing or court depends largely on the nature of the offense and the youth’s previous contacts with the criminal justice system.<sup>43</sup>

Conferencing occupies the second procedural tier in the three-tiered Australian system structured under the Young Offenders Act.<sup>44</sup> The first official recorded response to juvenile crime is a formal “police caution.” If a formal caution is issued, a police officer can require a youth to pay compensation to a victim (not exceeding \$5,000), carry out community service (not exceeding seventy-five hours), or “do anything else that may be appropriate under the circumstances” (so long as the order requires no task that would take more than three months to complete).<sup>45</sup> At the most serious level, a juvenile may face Youth Court, in which an offender may be sentenced to community service (not to exceed

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<sup>40</sup> See Hennessy Hayes & Kathleen Daly, *Youth Justice Conferencing and Reoffending*, 20 *JUST. Q.* 725, 726–28 (2003).

<sup>41</sup> See Young Offenders Act, 1993 (S. Austl.); Youth Court Act, 1993 (S. Austl.); Children’s Protection Act, 1993 (S. Austl.). See generally Joy Wundersitz, *Family Conferencing and Juvenile Justice Reform in South Australia*, in *FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM?* 87, 87–89 (Christine Alder & Joy Wundersitz eds., 1994).

<sup>42</sup> See Kathleen Daly, *South Australian Juvenile Justice Research on Conferencing: Technical Report No. 1, Project Overview and Research Instruments 5* (1998).

<sup>43</sup> *Id.* at 6.

<sup>44</sup> *Id.* at 7.

<sup>45</sup> *Id.*

500 hours) or detention. The second-tier option is conferencing, which is reserved for offenses where both compensation (not to exceed \$25,000) and community service (not to exceed 300 hours) may be appropriate consensual solutions.<sup>46</sup>

The conferencing process, with a structure similar to a mediation, ideally involves all interested parties – including victims, offenders, parents, and police officers – and a Youth Justice Coordinator who acts as conference facilitator. After all parties have an opportunity to describe the incident from their point of view, the victim is given the option to ask the offender questions such as: “Why did this happen to me?” and “Will this happen to me again?” The final stage of the process involves finding a way for the offender to make amends for committing the offense. Ideally, this final stage is the result of a collaboration between all of the parties in the room.<sup>47</sup> If all goes well, the conference process will embody the fundamental principles and goals of the restorative justice movement: offenders will acknowledge their wrongs and make amends, victims and offenders will achieve some measure of empathy, understanding and reconciliation, and decisions will have been made democratically by stakeholding parties instead of government officials.<sup>48</sup>

During the first year, SAJJ observed eighty-nine conferences held over a twelve-week period.<sup>49</sup> The SAJJ project collected conferencing data in two waves; the first in 1998 and the other – consisting of follow-up interviews with victims and offenders from the previous study – in 1999.<sup>50</sup> Only personal assault and property offenses were eligible for inclusion in the study.<sup>51</sup> Fifty-one percent of victims were male and forty-nine percent female. Of property victims, total out-of-pocket expenses ranged from \$0 to \$6000 (Australian) with the mean falling at over \$900 and the median at \$400.<sup>52</sup>

The study pursued three objectives. First, it explored the degree to which conferences were restorative for victims and offend-

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<sup>46</sup> *Id.* at 7.

<sup>47</sup> For a more detailed description of conferencing in Australia and New Zealand, see Hayes, *supra* note 40, at 726–728.

<sup>48</sup> See Daly, *supra* note 42, at 6.

<sup>49</sup> See Kathleen Daly, *South Australia Juvenile Justice Technical Report No. 2: Research Instruments in Year Two* 6 (2001).

<sup>50</sup> See Daly, *supra* note 42, at 19.

<sup>51</sup> See *id.* at 16. Forty-four percent of the cases were personal attacks and fifty-six percent were property crimes. *Id.* at 26.

<sup>52</sup> See Daly, *supra* note 49, at 14.

ers. Second, it probed whether conference participants functioned as democratic decision-makers pursuant to restorative justice theory. Third, it questioned whether participants' perceptions of the restorativeness of the process and its level of procedural justice correlated with the participant's role (coordinator, victim, offender, or police officer), socioeconomic background, the type of crime, and the level of distress experienced by the victim as a result of the crime.<sup>53</sup>

Restorativeness was measured by "the degree to which offenders and victims recogni[z]ed the other and were affected by the other."<sup>54</sup> The markers for victim-offender recognition included "the degree of movement and understanding between victim and offender . . . the willingness of the offender to 'repair the harm' . . . and the participation of those affected by the crime in discussing the offence and what should be done."<sup>55</sup>

The results of the SAJJ study suggested that the conferences succeeded as models for democratic decision-making, but were less successful as restorative or emotionally transformative events.<sup>56</sup> Conferences received good grades for procedural justice – the degree to which stakeholders felt they were treated fairly, respectfully, and were allowed to participate in the outcome. The scores for conference restorativeness were not as stellar. While procedural justice was judged present in eighty to ninety-five percent of conferences, restorativeness was perceived extant in only thirty to fifty percent of cases. This data suggests that even when participants feel the process is fair, movement between the victim and offender may be more difficult to achieve.<sup>57</sup>

If victims and offenders cannot manage empathy or understanding for each other in a process they mutually acknowledge to be fair, what is keeping them apart? A number of factors may be

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<sup>53</sup> See *id.* at 6.

<sup>54</sup> Kathleen Daly, *Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects*, in *RESTORING JUSTICE FOR JUVENILES: CONFERENCING, MEDIATION AND CIRCLES* 59, 76 (Allison Morris & Gabrielle Maxwell, eds. 2001). "Positive movement" is "the expression of a mutual understanding or regard for the other, which develops over the course of the conference." Kathleen Daly, *Mind the Gap: Restorative Justice in Theory and Practice*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?* 219, 224 (Von Hersch et al. eds. 2003).

<sup>55</sup> Daly, *supra* note 49, at 60.

<sup>56</sup> Daly, *Mind the Gap: Restorative Justice in Theory and Practice*, *supra* note 54, at 233–234.

<sup>57</sup> See Kathleen Daly, *Restorative Justice: The Real Story*, 4 *PUNISHMENT & SOC'Y* 55, 69–70 (2002).

at work, including offender sincerity<sup>58</sup> and communication failures,<sup>59</sup> but a significant barrier to restorative movement was found to lie in victim distress-levels. High levels of distress correlated with little restorative movement; lower levels of distress correlated with success in forging ties and rebuilding trust. Once again, it appears trauma is a significant factor affecting the process.

To measure victim trauma, researchers in the 1999 SAJJ asked victims a variety of questions about their psychological well-being, focusing on indicia of distress like “fear of being alone,” “sleeplessness or nightmares,” “general health problems,” “general increase in suspicion or distrust,” “sensitivity to particular sounds or noises,” and “loss of self-confidence.”<sup>60</sup>

Low-distress victims accounted for 40.5% of victims. These were mainly people who had suffered injury in an occupational role; for example, an office manager who supervised operations in a supermarket that had been broken into. High distress victims comprised the remaining 59.5% of victims.<sup>61</sup> They were more likely to be female, a victim of personal crime, a victim of a violent offense, and a victim who knew the offender well before the crime was committed.<sup>62</sup>

When victims were asked to rate the restorative quality of the conferences on a continuum from low to high – with low indicating lower levels of conciliatory movement and high indicating that the conference “end[ed] on. . . a positive note of repair and good will” – some interesting patterns emerged. Higher percentages of high-distress victims populated the “low” conferences (seventy-two per-

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<sup>58</sup> It is not clear that offenders entered into the conferencing process with the intent to engage seriously with the victim. Only forty-seven percent of offenders said they had given any degree of thought to what they would do or say to the victim at the conference. See Daly, *supra* note 54, at 248–249. This lack of attention or forethought was mirrored in many offenders’ implacability in the face of victim narratives. Nearly half of all offenders said that the victim’s story had no effect on them. See *id.* at 7. Many offenders commented that they were less worried about meeting the victim than about what penalty they would receive. See *id.*

<sup>59</sup> A majority of victims perceived that offenders were not sincere in their apologies even when a clear majority of offenders claimed to have been genuine in their apologies. See *id.* Kathleen Daly, author of the SAJJ study, hypothesized that in conferences, “communication failure and mixed signals are present when apologies are made and received.” Kathleen Daly, *A Tale of Two Studies: Restorative Justice from a Victim’s Perspective*, in *NEW DIRECTIONS IN RESTORATIVE JUSTICE: ISSUES, PRACTICE, EVALUATION* 153, at 156 (Elizabeth Elliot & Robert Gordon eds., 2005).

<sup>60</sup> See *id.* at 159.

<sup>61</sup> Each of the high and low categories originally consisted of two subcategories. High or moderate distress victims were collapsed into the “high distress” category and low or no distress victims were collapsed into the “low distress” category. See *id.* at 157.

<sup>62</sup> See *id.*

cent), and lower percentages of high-distress victims populated the “high” conferences. “[W]hereas [forty-five] per cent of high distress victims were in high conferences, nearly [seventy] per cent of low-distress victims were.”<sup>63</sup>

This differential is significant when considering how effectively “high” conferences satisfied the goals of restorative justice and how dismally “low” conferences performed on the same measures. For offenders interviewed at the time of the conference in 1998, “significantly higher proportions in the high conferences said that they felt sorry for the victim,”<sup>64</sup> and when followed up a year later, offenders in high conferences had lower rates of recidivism.<sup>65</sup> Victims in high conferences reported that they were less frightened of offenders and held fewer negative attitudes toward them. Moreover, when contacted a year later, they were more likely to say that the conference was worthwhile.<sup>66</sup>

The capacity of victims to engage in restorative behavior seemed to be linked to the level of the victim’s initial distress: High distress victims were more likely to feel upset about the offender’s comments<sup>67</sup> and were more likely to feel angry toward the offender during the conference.<sup>68</sup> No low distress victims reported that they were frightened of the offender, while forty percent of high distress victims were frightened of the offender. Significantly, when victims were asked whether they felt it was more important to be treated fairly in conference or to find common ground with the offender, sixty-seven percent of distressed victims said that to be treated fairly was more important, while seventy-one percent of non-distressed victims said that finding common ground was more important.<sup>69</sup>

In assessing the divergent ways in which high and low distress victims experienced their conference interaction, the SAJJ researchers concluded that the “[v]ictims who are ‘lightly touched’ by a crime orient themselves more readily to the ideal RJ script.”<sup>70</sup> They appear better able to move out of their own hurt and imagi-

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<sup>63</sup> *Id.* at 160.

<sup>64</sup> *Id.* at 157.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Twenty-seven percent of high distress victims and four percent of low-distress victims felt upset by offender comments. *See id.* at 160.

<sup>68</sup> Sixty-two percent of high-distress victims and only seventeen percent of low-distress victims were angry toward the offender immediately after the conference. *See id.*

<sup>69</sup> *See id.* at 161.

<sup>70</sup> *Id.* at 162.

natively embrace the hurts and deprivations of the offender because the wrong has not affected them so deeply.<sup>71</sup> Distressed victims have a harder time mustering empathy and positive feelings for offenders. And because high distress victims are more likely to remain angry and fearful post-conference, and are less likely to feel "healed" by the experience, the psychological changes and therapeutic effects that restorative justice hopes for are not so easily achieved.<sup>72</sup>

While the immediate, positive effects of conferencing are promising, a victim's long-term recovery presents a better gauge of the effectiveness of the restorative process. It turned out that recovery rates across the board were directly linked to initial distress levels.<sup>73</sup> Those who came into the conferences with little to no distress reported high recovery rates.<sup>74</sup> Those who reported high rates of distress at the time of the conference reported higher rates of ongoing difficulty. "Whereas sixty-three to ninety-five percent of the moderate to no distress victims had recovered in 1999, seventy-one percent of the high distress victims had not."<sup>75</sup> For the high distress group, the experience of conferencing made little difference. They remained angry, upset, and raw as a result of the violation.<sup>76</sup> Interestingly, for women, the problem of ongoing dysphoria stemming from the crime was especially acute. Sixty-four percent of high-distress female victims reported that they had not recovered from the offense, whereas sixty-eight percent of high-distress male victims reported that they had recovered.<sup>77</sup>

Those who reported that they had recovered from their experience were asked whether their ability to move on after the offense was aided more by the justice process (the conference) or by actions they took themselves.<sup>78</sup> More than three-quarters of low-distress victims stated that the justice process had aided their recovery while less than half of high-distress victims reported that the justice process had been beneficial.<sup>79</sup> When victims who reported being non-recovered were asked what had hindered their recovery,

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See id.* at 162-163.

<sup>74</sup> *See id.* at 162, table 1.

<sup>75</sup> *See id.* at 162.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 162-163.

<sup>78</sup> *Id.* at 163.

<sup>79</sup> *Id.* at 161.

“seventy-four percent mentioned financial, physical, and emotional harms resulting from the offense.”<sup>80</sup>

The SAJJ study reveals that conferences can be beneficial to both offenders and victims – but that their benefits may reside more in affording stakeholders a space for democratic decision-making and less in the restorative effects achieved. This is especially true for victims who enter into the conferences significantly distressed. Victims coping with trauma lack the capacity to engage in the acts of grace that restorative justice contemplates. As compared to non-distressed victims, they are less able to empathize, understand and forgive and they emerge from the conferences with higher levels of anger and hurt. A year later, they still feel scarred by the crime.<sup>81</sup>

The victims in the SAJJ study suffered far less grievous wrongs than did the individuals surveyed in Rwanda and the former Yugoslavia. They experienced less trauma and they recorded less distress.<sup>82</sup> Still, even where the absolute levels of distress are lower, similar patterns emerge. Victims who enter into a restorative process in a high state of distress or trauma have trouble “following the script.”<sup>83</sup> Conversely, victims who suffer less distress – or have achieved a greater level of psychological equilibrium – are better able to listen, forgive, and move on; that is, they play the part expected of them by restorative justice theorists.

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<sup>80</sup> *Id.* at 162.

<sup>81</sup> *Id.* at 164 (stating that “[f]or the distressed victims in the SAJJ sample, 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.”).

<sup>82</sup> “Victims were injured in nearly [thirty percent] of matters, and over [sixty percent] of victims had out-of-pocket economic losses,” which means forty percent did not. “For those with losses, the average loss (after insurance) was AU\$1,076 [about US\$940],” so we are talking about relatively minor injuries. Daly, *supra* note 42, at 26.

<sup>83</sup> In a study of twenty-two victims of violent crime, restorative requests for voice and acknowledgment were paired with a strong interest in social validation. Victims “wanted their communities to take a clear and unequivocal stand in condemnation of the offense.” Judith Lewis Herman, *Justice from the Victim’s Perspective*, 11 *VIOLENCE AGAINST WOMEN* 571, 585 (2005). Although victims eschewed punishment for punishment’s sake, they nonetheless felt strongly that their communities denounce the crime and impose sanctions on the criminal. Public exposure of the perpetrator was important to victims as a larger expression of their attacker’s shame and their own blamelessness. *Id.* at 594.

## IV. CONCLUSION

The question of victim needs remains vexing. The data reviewed in this paper suggests that restorative justice theorists should eschew generalizations that homogenize victim wants and needs. It is crucial to look at the context of the victim and assess ongoing levels of trauma and distress.

In other work, I have argued that we should not expect victims who have been robbed of their livelihood – who are mired in poverty in part because of the violations of the offender – to “follow the restorative script.” I have argued that material deprivation can affect a victim’s ability to be spiritually magnanimous and that reparations must be provided to bring victims to a tolerable standard of living before we can expect forgiveness or reconciliation.<sup>84</sup> The Rwandan woman in the red dress who couldn’t forgive without milk for her children must be reckoned with.

But here, I broaden the concern for victim welfare. Material deprivation is but one form of suffering. Psychic security and emotional well-being must be addressed as well. Victims who entered into the SAJJ conferences with low or moderate distress found greater solace and were happier with the conference procedures than did the victims who entered into the offender-encounter still suffering from the crime’s traumatic effects. Rwandan victims who were afflicted with PTSD were skeptical of the restorative Gacaca process and found it difficult to envision a future of inter-ethnic cooperation.

What sort of grace can be extracted from a broken heart? These studies suggest that victims should be screened for trauma before being invited to participate in restorative processes. Moreover, if a country adopts a restorative procedure as a primary measure of doing justice – as the Rwandans did to move past the killings of the 1990’s – it would do well to offer assistance, material and emotional, to its most heavily burdened victims. Only with milk for the children and counseling for the mother will these victims be able to engage with the restorative vision being offered them.

Hannah Moore, a philanthropist of the 18th century, said, “Forgiveness is the economy of the heart . . . forgiveness saves the

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<sup>84</sup> Ellen A. Waldman, *Healing Hearts or Righting Wrongs?: A Meditation on the Goals of Restorative Justice*, 25 *HAMLIN J. OF PUB. L. & POL’Y.* 355 (2004).

expense of anger, the cost of hatred, the waste of spirits.”<sup>85</sup> Who would argue with that? But Andrew Solomon – author of the *Noonday Demon* – explains that depression makes such emotional husbandry impossible. He explains that depression “is the aloneness within us made manifest, and it destroys not only connection to others but also the ability to be peacefully alone with oneself.”<sup>86</sup> I want to offer the possibility that victims who are depressed and traumatized may need a bridge before they can go from the “noonday demon” to the “economy of the heart” and that the restorative justice community should spend more time thinking about the bricks and mortar needed to support that journey.

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<sup>85</sup> *Hannah Moore Quotes*, BrainyQuotes, <http://www.brainyquote.com/quotes/quotes/h/hannahmore129124.html> (last visited July 15, 2007).

<sup>86</sup> ANDREW SOLOMON, *THE NOONDAY DEMON: AN ATLAS OF DEPRESSION* 1 (Scribner 2001).