RESTORATIVE PRACTICES:
FROM THE EARLY SOCIETIES
TO THE 1970s

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Abstract

Restorative practices now appeal to the contemporary politician. Policies and practices are being reformed using the paradigm of restorative justice. However, little research has been done on its historical roots. Many have even claimed that restorative practices do not have a history at all. Through a review of historical and contemporary sources, this article challenges this claim. The paper provides a brief historical account of restorative practices stretching from the acephalous societies until the 1970s. Four eras are identified in the fall and rise of restorative justice through time. A historical debate and further academic research on restorative justice is warranted. The implications of a more informed understanding of the history of restorative practices are significant for their implementation in contemporary society.

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Historical gaps in the concept of restorative justice

Despite a plethora of definitions and studies on the meaning of restorative justice, there is still conceptual ambiguity[2]. For the purposes of this paper, Gavrielides' definition is accepted. Restorative justice is defined as "an ethos with practical goals, among which to restore harm by including affected parties in a (direct or indirect) encounter and a process of understanding through voluntary and honest dialogue[3]. Restorative justice, Gavrielides argues, "adopts a fresh approach to conflicts and their control, retaining at the same time certain rehabilitative goals"[4]. Restorative justice practices consist of: direct and indirect mediation, family group conferences, healing/sentencing circles and community restorative boards[5].

The term "restorative justice" was first introduced in the contemporary criminal justice literature and practice in the 1970s[6]. Van Ness and Strong[7] claimed that the term was coined by Albert Eglash in a 1977 article[8] but then[9] cited research of Skelton[10] who found that the 1977 chapter was a reprinted article from a series that Eglash published from 1958-59[11].

The 1970s appear to be the decade when criminologists around the world started to think less favourably about what we understand today as the criminal justice system. It was also the decade when alternative paradigms were sought[12]. Arguably, what first provoked the interest in "restorative justice" as such, were three 1977 articles by Randy Barnett[13] Nils Christie[14] and Albert Eglash[15]. They were among the first to speak of a crisis, taking place in the criminal justice system, and of an alternative paradigm, which could fundamentally replace the punitive one.

What paved the way was the work of victimologists such as Hans von Hentig[16] (1887-1974) and Benjamin Mendelsohn[17] (1900-1998). Margery Fry[18] (1874 – 1958) and Stephen Schafer are two more examples. Margery Fry, a British reformer, claimed that victims were being ignored by the criminal justice system, and proposed a formal use of restitution[19]. In 1970, Stephen Schafer claimed that "if one looks at

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[2] See Mackay (2002); Johnstone (2002); Gavrielides (2008).
[3] Gavrielides (2007 p 139).
[4] Gavrielides (2007 p 139).
[5] Walgrave and Bazemore (1999); Crawford and Newburn (2003); Gavrielides (2007).
[6] The first contemporary RJ practice took place in Ontario (Canada) when Yantzi, a probation officer, initiated the Victim Offender Reconciliation Programme (Yantzi 1998).
[7] (1997 p 24)
[8] Eglash (1977)
[9] Van Ness and Strong (2010)
[10] Skelton (2005)
[11] Skelton found that Eglash's source was Heinz Horst Schrey's 1955 book *The Biblical Doctrine of Justice and the Law*, originally published in German and then translated and adapted into English.
[12] De Haan (1987).
[13] Barnett (1977).
[14] Christie (1977).
[15] Eglash (1977).
[16] Hentig (1948).
[17] Mendelsohn (1937).
[18] Fry (1951)
[19] Arguably, Fry's work led to the creation of State victim compensation programmes in the early 1960s in Britain and New Zealand. These served as models for many other countries.

the legal systems of different countries, one seeks in vain a country where a victim of crime enjoys a certain expectation of fully restitution for his injury"[20].

Barnett, Christie and Eglash have been described as 'penal abolitionists'. The central contention of Abolitionism is that: "events and behaviours that are criminalized only make up a minute part of the events and behaviours that can be so defined" and that crime is not the object, but the product of crime control philosophies and institutions"[21].

What followed were volumes of writings on restorative justice, while practices that come under its umbrella term started to be implemented around the globe and principally in countries such as Australia, Canada, New Zealand, the UK and USA. Gavrielides argued that this rapid theoretical development of restorative justice did not match the pace of its implementation[22]. Subsequently and in conjunction with several other policy, social and financial reasons, we are now experiencing a gap between the theory and practice of restorative justice[23]. However, it is not the intention of this paper to look into this gap or indeed explore any issues of contemporary application or theorising of restorative justice.

The primary objective of this paper is to explore the history of restorative practices in the hope that this may provide a context for their current understanding and application. The research that this paper is based upon involved analysis of historical and contemporary sources. The approach was international and comparative as the arguments were developed through examples of various historical justice systems that introduced restorative elements to resolve conflicts.

The data are presented in four sections. These correspond to different chronological eras in the fall and rise of restorative justice, with each signifying a crucial turn in its history, whether it meant its erosion or return. The reasons that brought these changes about will also be discussed. The paper argues that the roots of the concept of restorative practices are ancient, reaching back into the customs and religions of the most traditional societies[24]. In fact, some have claimed that the restorative justice values are grounded in traditions of justice as old as the ancient Greek and Roman civilisations[25]

The paper argues that restorative practices were favoured by ancient societies particularly since their focus was not to make 'offenders' pay, but make reparation to the person – and not the State – they wronged, building stronger futures at interpersonal levels. The historical review of the paper will also show that although 'crime' and 'punishment' are today traditionally associated, this has not always been the case. Modern criminal justice and punishment are relatively new institutions. In other periods and cultures, the response to, what we call today, 'delinquency' did not fall within the legal positivistic understanding of 'crime' adopted by our modern

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[20] Schafer (1970 p 117).
[21] De Haan (1987).
[22] Gavrielides (2007; 2008).
[23] Gavrielides (2007).
[24] Braithwaite (2002 p 64-68).
[25] Van Ness and Strong (1997 p 24).

Western societies. This resulted only after the 18th century, principally with the political philosophies of Thomas Hobbes (1588-1679), David Hume (1711-1776) and Jeremy Bentham (1748-1832). In fact, what we understand today as 'crime' was seen by the early communities as a conflict between individuals. Consequently, the terms "offender" and "victims" were coined as a result of this legal positivistic framework.

The paper will also show that before restorative justice re-appeared in its current form, it did a full circle with a historical rise and fall. Subsequently, the historical analysis of the chain events completing this circle of rise and fall raise a number of urgent questions relating to restorative justice's applicability within the contemporary context of our criminal justice systems.

The paper will argue that the implications of a more informed understanding of the history of restorative justice are significant. For example, the historical events that will be unravelled in this paper suggest a cycle of fall and rise of restorative justice through time, and point out a number of historical factors that brought restorative justice to its marginalisation. Indeed it is impossible to safely claim that the current and future theoretical potential and practical implications of restorative justice is well understood, if the historical events surrounding it are not captured. In his work, 'The Peloponnesian War', Thucydides said "History is a mirror that reflects the future, and by examining it we understand what is yet to come".

From the early societies to 500 AD

According to Raymond Michalowski, human societies can be broken down into two broad historical categories: 'acephalous' (from the Greek word ακέφαλος meaning headless) and 'State'. Acephalous societies are the earliest human aggregations recorded in history and are characterised by their diffuse structure, kin-based organisation, and strong adherence to group values[26]. They are also the earliest type of human aggregations and the only kind of community for some 30,000 years. Arthur Hartmann claimed that acephalous societies (or non-State) can be distinguished between nomadic tribes and segmental societies; both were small, economically cooperative and relatively egalitarian[27].

René Kuppe mentions three central characteristics of acephalous societies: "a close relationship between these societies and their lebensraum[28], a lack of organization as state and social stratification (from the point of view of western sociology), and the dealing with conflicts within a society that is not based on institutional force by the state"[29].

Michalowski claimed that these communities managed to place constraints on potential deviants by supporting collective responsibility, and by promoting a group feeling, which reduced the likelihood of egoistic interests. Then again, if deviance did occur, acephalous societies dealt with it without a formal legal system. In fact, they

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[26] Michalowski (1985).
[27] Hartmann (1995).
[28] German for "habitat" or literally "living space".
[29] Kuppe (1990 p.10).

regained community's lost balance by doing something either for the victim or to the offender.

Arguably, one of the best examples of ancient type of victim restoration is given by historian Roy Franklin Barton, who studied the acephalous society of *Ifugao* of Northern Luzon in the Philippines. He claimed that "The kin of each party were anxious for a peaceable settlement, if such could be honourably be brought about…Neighbours and co-villagers did not want to see their neighbourhood torn apart by internal dissension. Instead of feuding, claims and counterclaims were relayed by the *monkalun* [the go-between/mediator] until a settlement was achieved"[30].

In a similar vein, Michalowski claimed that there were four ways through which the distorted balance was re-established in acephalous societies: blood revenge, retribution, ritual satisfaction, and the most commonly used of all, restitution. Nowadays, the meaning of the latter varies. For instance, it can mean: restoration, amends, repayment, compensation or forgiveness. In the ancient acephalous societies, however, where community members, 'victims' and 'offenders' conceived 'antisocial behaviour' in a fundamentally different way from the one we adopt today, restitution was understood in its fullest sense.

In particular, Michalowski argued that in these communities relationships and victim-offender interaction were personal, and usually led to strong bonds and sometimes even to reduction in deviant behaviour. Most importantly, deviance was seen as a community problem, and a community failure not simply as a matter for the offender to pay or restore. In consequence, its recuperation required active participation of both victim and offender. The process was usually a restorative one, while the leading role of the mediator was taken up by the community through its representatives. They believed that by dealing with the offence at a personal level, the offender was often 'rehabilitated', and the potential criminal 'deterred'. On the other hand, the victim's feeling of loss was restored, and the distorted balance in the community was re-established[31].

Some evidence of this can be found in historian Adamson Hoebel's work. Hoebel claimed that in some Eskimo villages although blood revenge was accepted in cases of homicide, it was used only rarely. Often, he said, there was no need for a community response, because the murderer discharged the victim's immediate responsibilities. "Murder was followed quite regularly by the murderer taking over the widow and children of the victim"[32]. His study concluded that: "just as doctors are charged with keeping the human body in healthy balance, pre-modern law was to keep the social body in good health by bringing the relations of the disputants back into balance"[33].

Hoebel's claim is supported by the work of historian Elizabeth Colson. In her study of the *Nuer* tribe of the Sudan, Colson claimed that if a *Nuer* was killed,

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[30] Barton (1919 p. 94).
[31] Michalowski (1985).
[32] Hoebel (1954 p. 83).
[33] Hoebel (1954 p. 279).

consequent reaction depended on whether the offender and victim belonged to the same or different lineage, or different tribes[34].

The details of restorative justice's implementation in the justice systems of the early societies is documented in a number of other historical sources, many of which indicate that 'punishment', in today's sense, was the exception rather than the norm. For example, the *Code of Hammurabi* (c.2380 BC), which is one of the first samples of written law, espoused the practice of individual compensation. On several occasions, this served as a substitute for the death penalty[35]. Furthermore, in the Ninth Book of the *Iliad*, Homer referred to the case of Ajax, who criticized Achilles for not accepting Agamemnon's offer of reparation. In his criticism, Ajax pointed out to Achilles that even a brother's death may be compensated by the payment of money. It is worth noting that the word 'punishment' derives from the Greek word *pune* (ποινή), which means an exchange of money for harm done, while the word 'guilt' may derive from the Anglo-Saxon word *geldam*, which means payment[36].

In fact, the bulk of the available historical sources on restitution suggest that "the concept was used for both property and personal crimes"[37]. Ian Drapkin claimed that restitution was implemented in almost all ancient societies, which included property offences as well as 'crimes' against persons[38]. Moreover, according to Stanley Diamond's research on the sanctions imposed for homicide, monetary restitution was an accepted form of penalty throughout the Western world[39].

Randy Barnett also claimed that: "of 100 scattered tribal communities, as to which the information is of undoubted reliability, 73% called for a pecuniary sanction versus 17% that called for a certain number of persons to be handed over to the family of the victim as a sanction"[40]. In addition, Stephen Shafer noted that among Indian Hindus and Semitic nations the death fine and restitution were used, and continued to prevail for centuries: "he who atones is forgiven"[41].

Dieter Rossner claimed that a number of important principles of 'crime control' can easily be identified in the then systems of 'social control'. An example is the institution of *palaver*, which is also mentioned in Frans de Waal's book 'Peacemaking among Primates'[42]. According to *palaver*, the offender and the victim were placed in a hut without walls in the middle of the community in order to control the dispute as well as to protect the victim against a second victimisation at the hands of the offender. In this 'vocal public dispute', Dieter Rossner claimed, we can find a clear and simple representation of a modern criminal justice system with strong elements of restorative justice. The only difference in this version, he said, is that "it is the act of

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[34] Colson (1962).
[35] Gillin (1935).
[36] Braithwaite (2002 p.5).
[37] Weitekamp (1999 p.83).
[38] Drapkin (1989).
[39] Diamond (1935).
[40] Barnett (1977 p 352).
[41] Schafer (1968).
[42] De Waal (1990).

disputing itself that resolved the conflict"[43]. *Palaver* was not about contesting the legality of the act that harmed the victim and placed the offender in a shameful position. *Palaver* was about finding out what went wrong and what the community could do to put right its failure to keep the victim safe and the offender out of trouble.

The preference of restorative practices as well as their apparent apparent success in maintaining healthy and effective 'justice systems' was favoured by the less complicated nature of the then communities and their less punitive understanding of conflicts. Moreover, the "citizens" were then more able to identify the benefits of 'non-violent communication' and victims/ offenders were not classified as such[44]. As Anna Brauneck suggested, reconciliation guaranteed more social safety, stability and progress than continuing reactions in a cycle of violence[45]. In the words of Saint Paul: "Where sin abounded, grace did much more abound"[46].

To conclude, despite occasional disagreement in the literature, there is consensus that during the times of acephalous societies, restorative practices used to provide the main route to conflict resolution, peace and order. This paradigm's principal concerns were firstly to satisfy victims' needs and secondly to restore their lost power and distorted status. Special care, however, was also taken by the community to be just and beneficial to offenders. Principally, the response aimed at educating the wrongdoer by speaking to their feelings, while through the victim's forgiveness and community's willingness to help, they were most often 'rehabilitated'.

The Middle Ages: 500-1350 and 1350-1500

According to some, after the emergence of centralised rulers, acephalous societies were gradually replaced by State ones[47], while at the same time, the restorative justice paradigm started to weaken. Unlike acephalous societies, state societies had a clear hierarchical structure whereby the ruler – whether in the form of a king, tribal leader or elected government – took the lead in the administration and management of citizens' affairs.

Stephen Schafer noted that as the transition took place the needs of the victims were replaced progressively by the interests of the kingdom, which became the basis for conflict resolution[48]. In fact, the sovereign became the central leader for settling disputes, and restitution was no longer due to the victim but to the king.

There is general agreement in the literature that in Europe, restorative practices started to deteriorate during the Middle Ages, and that the major change occurred in the 9th century[49]. It is also believed that restorative justice's erosion as a formal paradigm for 'criminal justice systems' was complete by the end of the 12th century[50].

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[43] Rossner (1989 p. 215).
[44] Rossner (1999 p. 214).
[45] Brauneck (1974).
[46] Romans 5 (p. 20).
[47] Kuppe (1990).
[48] Schafer (1968).
[49] Fry (1951); Gillin (1935); Laster (1975).
[50] Rossner (1989).

The Middle Ages are defined as "the time in European history between classical antiquity and the Italian Renaissance-from the late 5th century AD to about 1350, sometimes to the later part of this period (1100) and sometimes extended to 1450-1500[51]. The Middle Ages are usually divided into two timeframes: 500 to 1350 AD and 1100 to 1500 AD[52].

During the first period, restorative practices were still used in a way that benefited the victim, the offender and the society, but was no longer the main conflict resolution paradigm[53]. Responsibilities were no longer collective, and the obligation to conform to social rules became rather abstract. Historian Henry Maine noted: "with the coming of the 'State power' the individual was steadily substituted for the family as the unit of which civil laws take account"[54].

For example, in the Kingdom of England, after the Norman Conquest in 1066 AD, the system of *frankpledge* (free security) was developed in much of the country. This is described as a kind of collective bail, imposed not after the individual's arrest, but as a safeguard in anticipation of it. This approach to freedom and responsibility is evident in a law of William I: "Every man who wishes to be accounted as free shall be in pledge" (Holdsworth 1956: 14-15). According to Robert MacKay, it became possible to appease the feud by the acceptance of payment of compensation[55]. Arguably, during this first Middle Ages timeframe "in Anglo-Saxon and other Germanic laws, the idea of wrong to a person or his kindred was still primary, and that of offence against the common weal secondary, even in the gravest cases" (Pollock and Maitland 1898: 46).

Gradually, the idea of wrong to a person started to lose ground. For example, the notion of *infangthief* was introduced, which obliged offenders to make two payments of composition for injuries other than homicide: *bot* to the injured party and *wite* to the lord or king[56]. By the time of Ranulf Glanvil, whose *Treatise* was written at the end of the reign of Henry II[57] (1187 AD), the victims' claim to *bot* was circumscribed. To conclude, during the first timeframe of the Middle Ages, victims could still obtain compensation and restitution, but only under certain circumstances. However, hard evidence about the enforceability of these laws does not appear to be available.

During the second period of the Middle Ages, victims are said to have lost completely their place in the system of criminal justice. This change is documented in Gilbert Geis' work. There, he used historical examples to show that it was during this part of the Middle Ages, when kings established their power and took the conflict-

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[51] Random House (1968).
[52] Random House (1968).
[53] Jacob (1970); Laster (1975); Schafer (1968).
[54] Maine (1905 p. 78).
[55] Mackay (1992).
[56] Pollock and Maitland (1898 p.451).
[57] The 'Treatise on the Laws and Customs of the kingdom of England' (1187-1189) is the first treatise on the common law of England. Ranulf Glanvil, its supposed author, was a prominent lawyer and advisor to King Henry II. He was also a soldier leading the English army in the 1174 victory over the Scots at Alnwick.

solving process away from the parties involved by creating a firm 'State'-controlled criminal justice system[58]. For instance, in the Anglo-Saxon hemisphere, after the division of the Frankish Empire by the treaty of Verdun in 843 AD[59], restitution was replaced by a fine payable not to the victim, but to the king.

Many historians claim that the Anglo-Saxon and Germanic rulers of the second timeframe gradually made the administration of justice a profitable institution by taking away victims' rights to compensation, and by imposing fines that were payable to the 'State'[60]. As Frederick Pollock and Frederic Maitland quoted in their 1899 work: "the loser of stolen goods might thank his stars if he was able to get them back again, so keen was the king in pursuit of the chattels of the felons"[61]. John Jeudwine gave the example of Henry III (1255 AD) who, when in need of funds, ordered his justices to impose monetary penalties[62]. It is said that during the 13th century, money collected from fines was equal to one sixth of the king's revenue.

Pollock and Maitland said that one justification that was quoted for these changes was: "The wrong done to an individual extends beyond her own family; it is a wrong done to the community of which she is a member; and thus the wrong-doer maybe regarded as a public enemy"[63].

In Europe, what is really believed to have caused this change was the increasing power of kingships as trans-local and trans-tribal institutions[64]. This is mainly because they united the tribes and large areas, changing in this way the structure of societies from 'communitarian/tribal' to 'hierarchical/feudal'. For example, Randy Barnett claimed that what helped this to happen was the ecclesiastic law of that time[65]. This claim is also supported by William Tallack, who noted that the greedy ecclesiastical powers of the time aimed to exact a double vengeance upon the offenders by taking their property, and by applying corporal punishment or imprisonment, ignoring victims completely[66].

Braithwaite also noted: "long before the *Inquisition*, church leaders were among those who sought to secure their power through retributive affliction on the bodies of their flock"[67]. "It was the church that established prosecution as a central authority to assert its will and church heresy. The barbarism of the *Inquisition* was justified, because 'crime' was committed not against a victim, but against the moral order of the church"[68].

From 1500-1970s

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[58] Geis (1977).

[59] This was one of the most important treaties of Europe. It divided Charlemagne's vast empire, and laid the foundations for what would become the independent States of France and Germany.

[60] Holdsworth (1956 p.358).

[61] Pollock and Maitland (1898 p.495).

[62] Jeudwine (1917 p.155-156).

[63] Pollock and Maitland (1898 p.47).

[64] Barnett (1977).

[65] Barnett (1977).

[66] Tallack (1900).

[67] Braithwaite (2002 p.7).

[68] Braithwaite (2002 p.7).

By the end of the 12th century, in Europe, the 'State' had taken control of conflicts[69]. Raymond Michalowski claimed that formal law emerged as a means of controlling property and relations, and that the concept of individual property and the history of law were from then and on inseparable[70]. As Jeremy Bentham put it: "property and law are born together and die together"[71].

In consequence, as the rights of the 'State' gradually overshadowed those of the victim, restorative justice ceased to play a role in the administration of justice. What also emerged from this development was the division of law between 'public' and 'private'. According to this new paradigm, 'crime' was mostly dealt with as an act against the State and the public interest, while offences against individuals' rights were pursued separately as 'torts'. The terms "offender" and "victims" started to be used.

During this period, political philosophers Jeremy Bentham (1748-1832) and John Austin (1790-1859), argued that the law is a phenomenon of large societies with a 'sovereign'. This can be a determinate person or group who have supreme and absolute *de facto* power[72]. The laws in these societies, including our Western countries, are a subset of the sovereign's 'commands'. These are general orders that apply to classes of actions and people, and are backed up by threat of force or sanction. This imperatival positivist theory identifies the existence of legal systems with patterns of command and obedience that can be ascertained without considering whether the sovereign has a moral right to rule or whether his commands are meritorious[73].

Nonetheless, it is worth noticing that despite the apparent erosion of restorative practices during that time, the concept's ideals were not completely abandoned. As Elmar Weitekamp pointed out: "the [restorative] system was not voluntarily abandoned by the people; it was deliberately and forcibly co-opted by the crown and then discarded[74]". In fact, there is evidence to believe that during these times, although the restorative paradigm remained dormant and relatively inactive, it was never forgotten by the communities[75].

In fact, a change in criminal proceedings, which occurred between the 16th and 17th centuries, is considered rather important for the way some procedural features developed in a number of European countries at the time. For instance, the then German legal system developed the notion of *adhaesionsprozess* [joined process], which allowed criminal prosecution to be combined with civil claims for compensation. Today, in most criminal justice systems, compensation for damages suffered still has to be pursued through the separate body of civil law[76]. The only

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[69] Christie (1977).
[70] Michalowski (1985).
[71] Diamond (1935 p.33).
[72] Austin (1832 [first published], 1873); Bentham (1838-1843).
[73] Johnson (1991).
[74] Weitekamp (1999 p.89).
[75] Gavrielides (2007).
[76] Harding (1982).

exception is with countries that followed the *adhaesionsprozess* (including Germany)[77].

In criminal justice systems such as these, the criminal case can be combined with civil action for purposes of procedural processing. The implications of this development was rather significant for modern criminal justice systems. The distinction, for example, between criminal justice systems that may combine civil action with criminal procedure and those that do not is considered one of the principal differences between adversarial (e.g. the UK, Ireland, USA) and inquisitorial criminal justice systems (e.g. Germany, France, Greece). The treatment of victims as parties in the criminal justice process varies significantly in these two models and the same applies for offenders[78].

Further historical evidence from this period also suggests that sporadic application of restorative justice in various legal systems was existent but only at an informal level and never endorsed by the State[79]. For instance, Joseph Sharpe claimed that in the 17th century various types of community based mediation were recorded throughout England[80]. These concerned 'crimes' where the offender was known. Cases were taken on an informal basis rather than as an official response to crime.

There are some exceptions to the above rule, however, and one of them is the 'Malicious Damage Act 1861' which according to Normandeau included strong elements of restitution and compensation. These allowed the owner of damaged property to obtain some recompense, while forfeiture of felon's property to the Crown was abolished by the 'Forfeiture Act 1870'. The latter allowed the criminal court to order payment by the offender of compensation up to £100 for loss of property on application by the victim[81]. Andre Normandeau also named another compensation plan proposed in 1847 by Bonneville de Marsangry, which combined restitution and compensation[82].

However, it was Sir Thomas More (1478-1535), who, among other legal theorists of his time, spoke in detail about the need to bring restorative ideals back. In his 1515 work *Utopia*, he claimed that: "restitution should be made by offenders to their victims; offenders should be required to work for the public to raise money for the restitution payments"[83]. Finally, restorative practices and restitution were strongly advocated in six international prison congress meetings, which took place between 1878 and 1900. [1878 in Stockholm (Sweden), 1885 in Rome (Italy), 1890 in Petersburg (Russia), 1891 in Christiana (Norway), 1895 and 1900 in Brussels (Belgium)].[84]

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[77] Harding (1982).
[78] Gavrielides (2005).
[79] Weitekamp (2000).
[80] Sharpe (1980)
[81] Section four of the 'Forfeiture Act 1970'.
[82] Normandeau (1973).
[83] More (1990 [1515]). More was followed by James Wilson, Cesare Beccaria, Rafaelo Garofalo, Jeremy Bentham and Enrico Ferri to name but a few.
[84] Jacob (1970).

According to Bruce Jacob, in the 1885 congress, the famous Italian jurist and criminologist Raffaele Garofalo (1851–1934) proposed that all nations return to the ancient concept of restitution[85]. Stephen Schafer also claimed that, both in the 1895 and 1900 congresses, restorative justice was dealt with intensively[86]. Samuel Barrows, on the other hand, reported that restitution was discussed as a new condition of suspension of sentence or conditional release after imprisonment[87]. The members of the conferences were unable to pass any specific proposal or resolution that would have required restorative justice in any of these forms. However, they did manage to pass a resolution that called their respective States to increase the rights of the victim under civil law[88].

The 1970s: the rise

The theoretical and practical developments of the 1970s brought restorative practices to a full circle. Although at first the restorative justice movement was very much aligned with the Abolitionists ideals, it gradually found ways to co-exist and indeed complement the punitive criminal justice system. Before the brief historical account of this paper is deemed complete a few contemporary writings that led to the development of the modern concept of restorative justice need to be mentioned.

As noted, Eglash distinguished three types of criminal justice: *retributive*, *distributive* and *restorative*[89]. He claimed that the first two focus on the criminal act, deny victim participation in the justice process, and require merely passive participation by offenders. The third one, however, focuses on restoring the harmful effects of these actions, and actively involves all parties in the criminal process. Restorative justice, he said, provides: "a deliberate opportunity for offender and victim to restore their relationship, along with a chance for the offender to come up with a means to repair the harm done to the victim…"[90].

With his article *Restitution: A New Paradigm of Criminal Justice*, Randy Barnett was the first to use the term 'paradigm shift'[91]. Barnett defined 'paradigm' as "an achievement in a particular discipline which defines the legitimate problems and methods of research within that discipline"[92]. Barnett claimed that we are living a "crisis of an old paradigm"[93], and that "this crisis can be restored by the adoption of a new paradigm of criminal justice-restitution[94]". In fact, in his 1977 article with John Hagel, he argued in favour of the abolishment of criminal law altogether, and

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[85] Jacob (1970).
[86] Schafer (1970).
[87] Barrows (1903).
[88] Geis (1977).
[89] Eglash (1977).
[90] Mirsky (2003 p.2).
[91] Barnett (1977).
[92] Barnett (1981 p.245).
[93] One of the most influential books on 'paradigm changes' is by Kuhn; 1970. There, Kuhn claimed that paradigms can replace another, causing a 'revolution' in the way we view and understand the world. What can cause such a change is a 'paradigm crisis'.
[94] Barnett (1977 p.245).

suggested that it is replaced by the civil law of 'torts'. They suggested that restitution constitutes a new paradigm of justice, one that is preferable to criminal justice[95].

One year later, Nils Christie[96], a Norwegian scholar, published an article in the 'British Journal of Criminology', which still provokes a number of discussions on the division of private and public law[97]. There, he claimed that the details of what society does or does not permit are often difficult to decode, and that "the degree of blameworthiness is often not expressed in the law at all"[98].

Christie argued that the State has 'stolen the conflict' between citizens, and that this has deprived society, victims and offenders of the "opportunities for norm-classification". Social problems, conflicts and troubles are inevitable parts of everyday life, he said, and therefore should not be delegated to professionals and specialists claiming to provide solutions. Christie believes that by restricting criminal procedure and law to the narrow legal definition of what is relevant and what is not, the victim and the offender cannot explore the degree of their culpability and the real effects of the case. He explained that the most important difference between the conventional criminal justice system and restorative justice is the contrasting values that underlie them.

In 1977, Martin Wright published: 'Nobody Came: Criminal justice and the needs of victims'[99]. In this early article, he proposed that the victim be helped by the offender or the community, and that the offender be required to make amends to both. This, he said, will demonstrate respect for victims' feelings and offer them practical help, while treating offenders in a way that will draw them back into society rather than increase their isolation. Wright claimed: "The boundary between crime and other harmful actions is an artificial and constantly changing one"[100]. "Crimes are not necessarily different in kind from other actions by which people harm each other…. Crimes are actions by which people cause certain types of harm, prohibited by law, and for which, if a person is convicted of them in court, a sanction may be imposed"[101]. In conclusion, he believes that restorative justice can create a new model of justice where "the response to crime would be, not to add to the harm caused, by imposing further harm on the offender, but to do as much as possible to restore the situation"[102].

Herman Bianchi, whose name is often forgotten in the contemporary literature s of restorative justice, is a Dutch criminologist, jurist, poet and historian, who is believed to be one of Europe's most prominent critics of imprisonment as a punishment for crime. As early as 1978, he claimed that there are better ways of

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[95] Barnett and Hagel (1977).
[96] Nils Christie is considered a leading proponent of the 'Informal Justice' movement. After 'Conflicts as Property', he published 'Limits to Pain', where he showed the connection between the "theft of conflicts" that he advanced in the article, and the use of punishment, (Christie; 1981).
[97] Christie (1977)
[98] Christie (1977 p.8)
[99] Wright (1977).
[100] Wright (1996 p.132).
[101] Wright (1996 p.133).
[102] Wright (1996 p.112).

dealing with society's criminals than putting them behind bars, arguing that the current criminal justice system is based on a view of justice as retribution[103]. What he proposed instead was justice as reconciliation. Justice, for him, is not a set of scales to be balanced, or a form of moral accounting – it is an experience. His interest grew stronger after the publication of a 1973 article on *Tsedeka Justice*[104], where he contrasted the *tsedeka* model with the punitive Western justice systems by focusing on a "priority of results over intentions"[105].

Moving on to 1980 and Howard Zehr whose most prominent piece of restorative justice work is his book *Changing Lenses*. There, he claimed that the current criminal justice system's 'lens' is the retributive model, which views crime as law breaking and justice as allocating blame and punishment[106]. Zehr sees 'crime' as a "wound in human relationships", and an action that "creates an obligation to restore and repair"[107]. To make his understanding of restorative justice clearer, he contrasted it with the retributive way of defining 'crime'. He argued that retributive justice understands 'crime' as "a violation of the State, defined by law breaking and guilt. Justice determines blame and administers pain in a contest between the offender and the State directed by systematic rules"[108]. On the other hand, restorative justice, he said, sees things differently as "crime is fundamentally a violation of people and interpersonal relationships"[109]. Restorative justice sees 'crime' as a conflict not between the individual and the State, but between individuals. Accordingly, this understanding encourages the victim and the offender to see one another as persons. In consequence, the focus of the process is on the restoration of human bonds, and the reunion of the two individuals and of the individual with the community. As he pointed out, this understanding of 'crime' "creates an obligation to make things right", and while "retributive justice focuses on the violation of law…restorative justice focuses on the violation of people and relationships"[110].

Through Braithwaite's *Crime, Shame and Reintegration* the idea of *reintegrative shaming*[111] was first introduced. This work has been highly influential in demonstrating that current criminal justice practice creates shame that is stigmatising. According to Braithwaite, restorative justice seeks to reintegrate the offender by acknowledging the shame of wrongdoing, but then offering ways to expiate that shame. Braithwaite believes that shaming is the key to controlling all types of crime. In particular, he distinguishes two kinds of shame. The first is, what he calls, *stigmatising shame*, as it disintegrates the moral bonds between the offender and the community. The second is the *reintegrative shame*, which strengthens the moral bonds between the offender and the community. *Stigmatisation* (bad shaming)

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[103] Bianchi (1978).
[104] *Tsedeka* conveys the Hebrew sense of 'justice', but defies easy translation.
[105] Bianchi (1973).
[106] Zehr (1990).
[107] Zehr (1990 p.181).
[108] Zehr (1990 p.181).
[109] Zehr and Mika (1998 p.17).
[110] Zehr (1990 p.199).
[111] Braithwaite (1997).

increases crime, but *reintegrative shaming* decreases it. Braithwaite embraces the idea of 'hating the sin but loving the sinner', claiming that offenders should be given the opportunity to re-join their community as law-abiding citizens. However, in order to earn this 'right to a fresh, start', offenders must express remorse for their past conduct, apologize to their victims and repair the harm caused by the crime.

Concluding Reflections

The paper has taken a bold step in painting a historical picture for restorative practices. Through the analysis of secondary historical sources, it argued that although the term restorative justice is a creation of the 1970s, the concept and practices underlying it can be traced as back as the early human civilisations.

These historical traces of restorative practices are not limited to a few places. On the contrary, they have been with us since we first felt the need to live collectively. In fact, for a number of centuries, they constituted the dominant features of the old 'justice systems' around the world, while, occasionally, they were put aside in favour of other more punitive responses. "Restorative justice has been the dominant model of criminal justice throughout most of human history for all the world's people"[112]. Some have disagreed with this conclusion[113]. Further research and historical debates are warranted.

The paper also argued that restorative justice has gone a full circle and distinguished four eras in the fall and rise of restorative justice through time. The paper also identified the major reasons that brought these historical changes about. Additional research will need to be carried out to drill down into the historical facts that brought these eras about. Their identification provides the first step in what restorative justice proponents called a much needed and much delayed historical scientific analysis of the restorative justice timeline[114].

As argued, during the first era, restorative justice elements were predominant among the 'justice systems' of *acephalous* societies, which used to place their emphasis on restoring harm. The diffuse structure of these societies, the emphasis on social safety and the absence of a top down regulation of human affairs favoured restorative justice. Historical evidence presented in this paper suggest that restitution was deemed appropriate even for the most serious cases falling within the public interest such as murder.

However, during the second era of the Middle Ages, and while the acephalous societies were being replaced by 'State' ones, conflicts were gradually seen as violations not of individuals' rights, but of the king. Although during the first timeframe of this long era, compensation and restitution were possible, resort to these means was no longer the norm. During its second timeframe, and while the 'State' and ecclesiastic powers grew stronger, victims lost their place in criminal proceedings, which became fully controlled by 'State officials'.

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[112] Braithwaite (1998 p.323).
[113] For example see Daly 2000 and Daly and Imarrigeon 1998.
[114] Gavrielides (2007).

The philosophical School of Legal Positivism of the third era followed as a natural consequence of the conceptual developments of that time, and as the *coup de grace* for restorative justice. Although various examples from this period suggest that restorative justice was sporadically applied and not completely abandoned, the new legally positivistic framework managed to predominate. It is also worth noting that during this era restorative justice was put in the margins and applied only within informal structures. The ruler and top down structures that were put in place to regulate individual and state affairs kept restorative justice in the shadow of the law and without any official provision of resources. The community and voluntary organisations were the main drivers in the implementation seat.

Nowadays, restorative justice seems to have again completed its historical circle and, as a result, it has been called back onto the criminal justice agenda. Only this time, the understanding we have of 'crime' is different. The societies of the old understood and resolved conflicts in a fundamentally different way from the one contemporary justice systems adopt. The core characteristic of their approach to 'antisocial behaviour' was its treatment as a violation of relationships. Therefore, their focus was to restore the 'broken bonds' among community members who had been affected by 'crime'. These members were not called "victims" or "offenders" but parties with a stake in a harm that occurred.

Today, delinquency is primarily seen as a violation of the law, while the priority is retribution, making also sure that lawbreakers, or other community members, do not repeat a similar offence.

Undeniably, the contemporary environments in which restorative justice is now implemented share few similarities, if any at all, with the old societies. More importantly, the statutory and common law definitions of 'crime' are fundamentally different and, in one way or another, have to involve 'punishment' mostly in the sense of incarceration. Therefore, it should be no surprise that the original concept of restorative justice was approached from the Abolitionists' perspective as a new paradigm of justice.

Nonetheless, as evidenced by the paper's examples, history has witnessed a constant adaptation of criminal justice notions and practices to the realities, needs and demands of the given societies in which they are introduced. As the theoretical and practical development of restorative justice moved away from the 1970s extremist approach and became more grounded on evaluation studies and research compromises started to take place. While the concept was developed in the literature and the practices started to be scrutinised and independently evaluated, the original abolitionists' movement that set off the interest in restorative justice started to weaken. In fact, there is evidence to believe that restorative justice in now accepted more as a complementary option that should be offered in conjunction with the criminal justice system[115]. Indeed, flexibility and adaptability are key ingredients of any response to 'crime'. Restorative justice is no exception.

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[115] Mandeed *et al* (2009 p. 433).

This paper has attempted a historical account of the restorative justice concept in the hope that it will lay the foundations for a more informed debate about its application and theoretical development today. Restorative justice continues to be implemented largely in the shadow of the law and by voluntary and community groups. Conflicts remain in the hands of the powerful state.

However, while searching for cost effective crime reduction policies in a climate of austerity and a shrinking state, restorative justice appeals to the policy makers and the politician. For instance, the new UK coalition government only a few months after its election rushed to announce new sentencing policies that see crime taken away from the state agents comprising the criminal justice system. The December 2010 Green Paper "Breaking the Cycle" announced its intentions for key reforms in the adult and juvenile sentencing philosophy and practice[116]. In the Paper, restorative justice is prominent although it was later referred to either for minor crimes or juvenile delinquency[117]. As hopes are raised amongst the restorative justice movement, the historical learning of the fall and rise of restorative justice are helpful in creating a context for what is yet to come.

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[116] Ministry of Justice (2010).
[117] Ministry of Justice (2011).

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