Private Crimes and Public Forgiveness: Towards a Refined Restorative Justice Amnesty Regime

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PRIVATE CRIMES AND PUBLIC FORGIVENESS: TOWARDS A Refined

RESTORATIVE JUSTICE AMNESTY REGIME

BY SHAWN FIELDS*

I. INTRODUCTION

In the wake of South Africa’s Truth and Reconciliation Commission, the academic and international community has begun rethinking the concept of amnesty and its place in the criminal justice system.1 Many previous amnesties granted full reprieves to criminals, either as a necessary precondition for securing a cease fire and restoring peace (as in Haiti in 1994) or as a way for dictators to hand over power without threat of prosecution (such as the blanket amnesties Augusto Pinochet granted himself and his military commanders).2 However, the South African model granted a form of “conditional amnesty” that neither gave perpetrators of apartheid a full reprieve nor held them fully accountable. Rather, South Africa’s newly elected government gave members of the old regime the opportunity to apply for amnesty, conditioned on their sworn testimony fully disclosing their involvement in human rights abuses.3 Under this system, Archbishop Desmond Tutu and others hoped to achieve a form of “approximate justice” that both restored victims’ dignity and allowed the long divided country to reunite through a process of reconciliation.4

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3 Michael P. Scharf, The Amnesty Exception to the International Criminal Court, 32 Cornell Int’l L.J. 507, 510 (1999) (explaining that, “[u]nder this process, amnesty would only be available to individuals who personally applied for it and who fully disclosed the facts of their apartheid crimes”).

4 See generally Richard A. Wilson et al., The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State (Cambridge University Press 2001). Howard Zehr uses the term “approximate justice” to describe the type of “partial . . . recovery and closure” one can
Archbishop Tutu and others advanced many justifications for granting amnesty to people who had perpetuated this system of injustice for so many years. Many argued that, because the crimes were so widespread and implicated so many South Africans, a nationwide “forgiveness and reconciliation” was needed to move the country forward out of the era of apartheid. Others suggested that, given the realities of the situation, offering amnesty in exchange for truth was the best justice one could offer. Because apartheid violence had been carried out under such a veil of secrecy, many perpetrators would have to come forward with the truth before successful prosecutions could proceed. Yet without a promise of amnesty, no one would have an incentive to offer such information. Thus, given the choice between watching criminals walk free and knowing nothing of their misdeeds and watching criminals walk free but knowing what had taken place, the government had to choose the latter. Still others have pointed to documents suggesting that amnesty was somewhat necessary to prevent a bloody and protracted civil war from breaking out across South Africa.

One might be able to justify conditional amnesties like the ones in South Africa under any of these rationales. However, this paper examines a further justification offered by the South African TRC, namely that the amnesty served the interests of “restorative justice,” a recently formulated alternative theory of criminal punishment. Restorative justice theory holds that criminal activity violates both the victim and the victim’s relationship with the offender, and that communities should focus more on repairing these individuals and relationships than on simply punishing the offender. This paper discusses the merits of employing restorative justice as a justification for granting conditional amnesty.

A. THESIS

State actors cannot justly defend grants of amnesty as furthering the goals of “traditional” restorative justice. There are three main reasons why restorative justice fails as a satisfactory justification for amnesty. First, restorative justice embodies a private concept of reparation and healing that cannot effectively be administered by the state. Second, restorative justice seeks primarily to promote healing by meeting the needs of individual victims, while amnesty often cannot meet these needs. Third, using amnesty to meet the goals of restorative justice unfairly

experience through restorative justice systems like the South African TRC. HOWARD ZEHR, CHANGING LENSES 188 (Herald Press, Scottsdale, PA 1990).

6 Wilson, supra note 1, at 17 (“On this account, the TRC was a tool of individual and national forgiveness and reconciliation between victim and violator . . .”).
7 Id., at 553-55.
8 One scholar has called this justification the theory of “moral remainder.” Id.
9 Scharf, supra note 3, at 510 (1999) (“Most observers believe the amnesty in South Africa headed off increasing tensions and a potential civil war.”); Martha Minnow, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 55 (Beacon Press 1998) (“[South African leaders] decided that the commitment to afford amnesty was the price for allowing a relatively peaceful transfer to full democracy”).
10 ZEHR, supra note 4, at 181-82.
11 By “traditional,” I mean the view of restorative justice that crime involves private violations of private relationships between individual victims and offenders. See id. Contrast this “classical” view with my refined conception of a “public-based” restorative justice that defines the victim more broadly to encompass the surrounding affected community. See infra Parts IV and V.
overlooks the rights and needs of others in the community who were not “directly” affected by the criminal act.

B. A NOTE ON SCOPE AND STRUCTURE

Both restorative justice and amnesty involve complex and controversial issues that lend themselves to lengthy analysis. Likewise, the nexus between restorative justice and amnesty offers a wealth of interesting topics that have and undoubtedly will continue to be discussed and debated. However, this paper is necessarily limited in its scope. Consequently, this paper will not address the legal legitimacy of amnesty, nor will it address the moral contours of amnesty beyond those implicated by restorative justice. Similarly, this paper will not examine the merits of alternative justifications of amnesty. While the scope of this paper does not lend itself to a historical discussion of amnesty, the South African experience will serve as a general case study. Finally, this paper will not directly assess the merits of restorative justice as a theory of criminal punishment, although some of the criticisms implicitly involve criticism of restorative justice theory.

This paper will focus on the specific use of restorative justice as a basis for granting conditional amnesty. To that end, Part II will briefly discuss the difference between conditional and unconditional amnesty, and explain why unconditional amnesty can never serve the interests of restorative justice. Part III examines the restorative justice model, both as a general theory of criminal punishment and as applied to amnesty situations. Part IV critiques the use of classical restorative justice as a justification for amnesty, focusing largely on the South African experience. Part V offers recommendations for a refined restorative justice amnesty regime, and Part VI concludes with a brief summary.

I. UNCONDITIONAL VERSUS CONDITIONAL AMNESTY

Amnesty arises in many different contexts and has taken many different forms throughout history. Deriving from the Greek word amnestia, meaning oblivion or forgetfulness, amnesty is an “act of the legal sovereignty voluntarily extinguishing certain ‘criminal’ acts against the state.” The early Greek and Roman states often granted amnesties to citizens politically affiliated with groups that had attempted to overthrow the existing government. This practice

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13 See, e.g., Slye, supra note 12.
16 Id. at 518 (“Most historians view amnesty’s clearest beginning in the act of Thrasybulus (403 B.C.), who, after the expulsion of the Tyrants from Athens, forbade further action against citizens for previous political acts, and required an oath of amnesty to erase all political strife from memory.”).
became increasingly common in Roman law as the Empire grew in size, mostly as an attempt to appease the growing numbers of discontents within Rome’s borders.\(^{17}\) Early modern European states frequently granted amnesty following an internal uprising to restore peace and quell violence.\(^{18}\) Following World War II, many countries granted amnesties to enemies either as a way of forgetting the past and moving forward, or because the sheer numbers of potential criminals overwhelmed the occupying powers.\(^{19}\) For example, the United States granted over one million amnesties each to prisoners of war in Japan and Germany in early 1946.\(^{20}\)

All of these grants are examples of “unconditional” amnesty, meaning that those granted amnesty had to do nothing in return. The state simply dropped any pending criminal charges and promised not to bring any future charges for past criminal behavior.\(^{21}\) Thus, the state “forgot” the crimes and allowed the individuals to continue living freely in society as if nothing had ever happened. Another type of unconditional or “blanket” amnesty became popular in Latin America in the 1970’s and 1980’s, although these amnesties arose in a significantly different context from those described above.\(^{22}\) For much of the 1970’s, many Central and South American countries were ruled by brutal dictators who committed grave human rights abuses, often torturing, raping, and killing political dissidents.\(^{23}\) As these leaders’ power structures began crumbling, they decided to grant themselves blanket “self-amnesties” before handing over power to legitimate authorities.\(^{24}\) These amnesties, though universally denounced, were seen as necessary to securing a peaceful transfer of power, and were reluctantly recognized by successor governments.\(^{25}\) Between 1974 and 1994 leaders in Bolivia, Argentina, Uruguay, Chile, El Salvador, Haiti, and Honduras granted themselves blanket amnesties before handing over power to democratically elected officials.\(^{26}\)

No unconditional amnesty, whether granted out of necessity or reconciliation, can be justified as serving the goals of restorative justice. Restorative justice aims to restore the victim of a crime to the position she occupied before the violation, typically through some form of restitution, or through an offender’s act of contrition or simple acknowledgement of responsibility.\(^{27}\) Yet unconditional amnesty, by definition, requires nothing from the offender – thus, it provides

\(^{17}\) Id.
\(^{18}\) Weisman, supra note 14, at 530.
\(^{19}\) Weisman, supra note 14, at 532 (discussing President Truman’s “pardon” grants for all nonmilitary federal crimes to all honorably discharged veterans, and his consideration of a “general amnesty” for military members).
\(^{20}\) Freeman, supra note 15, at 519; 1 ENCYCLOPEDIA BRITANNICA Amnesty 808 (1971).
\(^{22}\) Id. at 439-40 (describing the “current context of amnesty” as one marred by self- and blanket amnesties like those granted in Chile and other Latin American countries).
\(^{24}\) Id.
\(^{25}\) Young, supra note 21, at 440 (“A self-amnesty is . . . often viewed as necessary to governmental transition.”).
\(^{26}\) See supra note 23, at 855-57; Schey et al, supra note 1, at 332-38 (discussing the amnesties and largely unsuccessful truth commissions in Bolivia, Uruguay, and other countries); Scharf, supra note 2, at 8-9 (describing the pressure the United States and the United Nations put on Haitian leaders to grant amnesty to war criminals in exchange for peace).
\(^{27}\) Restorative Justice Online, Introduction: Amends, maintained by Prison Fellowship International, http://www.restorativejustice.org/intro/values/amends (last modified Dec. 9, 2004) (explaining that the offender can restore the victim through making amends, which includes four elements: “apology, changed behaviour, restitution, and generosity”).

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nothing to the victim.28 Therefore, only an amnesty conditioned on some act or forbearance on the offender’s part can further the purposes of restorative justice.

Many such conditional amnesties were granted in South Africa beginning in 1994. Teetering on the brink of civil war, the military and political leaders of South Africa’s thirty-four year old apartheid government negotiated a peaceful transfer of power to a democratically elected government in exchange for amnesty.29 But rather than granting unconditional amnesties, Archbishop Desmond Tutu and his newly formed government offered a form of “conditional amnesty.”30 The South African Parliament created a Truth and Reconciliation Commission (TRC), which only granted amnesty to “individuals who personally applied for it and who fully disclosed the facts of their apartheid crimes.”31 Thus, amnesty was conditioned on public truth-telling, or more specifically, on the full public disclosure of one’s criminal participation in apartheid.32 Controversially, applicants for amnesty were not required to express remorse for their actions or apologize to their victims.33

While South Africa’s model provides one example of conditional amnesty, states can certainly condition amnesty on any number of things, including payment of restitution or reparations, agreement not to hold positions of public trust, and public and personal apologies for criminal behavior. Of course, states justifying grants of conditional amnesty on the basis of restorative justice would do well to take into account the needs of the victims when creating their own amnesty commissions.34 Many argue that South Africa’s failure to adequately take victims’ needs into account when developing its Truth and Reconciliation Commission demonstrates why restorative justice provides no justification for the amnesties granted to apartheid officials in the 1990s.35 Indeed, as this paper illustrates, South Africa’s TRC neglected to respond to many victims’ basic needs, including the needs for acknowledgements of wrongdoing, for apologies, and for retribution.36

28 Ronald C. Slye, supra note 12, at 240-41 (2002) (explaining that unconditional, or “amnesic” amnesties “have no procedural requirements, nor do they . . . place burdens on recipients. [Further], amnesic amnesties provide no relief to victims . . .”).
29 See supra note 9, at 515.
30 Emily H. McCarthy, supra note 1, at 189 (noting that “South Africa’s process forces the apartheid regime to admit its abuses publicly and requires perpetrators to reveal and discuss their crimes”).
31 See supra note 3, at 518.
32 McCarthy, supra note 1, at 190.
33 Wilson, supra, note 1, at 549 (2001) (observing that confessions of participation in apartheid, “whether or not they were accompanied by expressions of remorse, were enough to secure public absolution from the TRC . . .”); McCarthy, supra note 1, at 244 (“Notably absent from the amnesty criteria is a contrition requirement.”).
34 The most pressing concern from a restorative justice standpoint is the concern for the victim’s immediate needs. ZEHR, supra note 4, at 186 (explaining that “the first goal of justice . . . ought to be restitution and healing for victims”).
35 See, e.g., Wilson, supra note 1, at 547 (arguing that “The amnesty on offer from the TRC actually denied . . . the restoration of dignity to victims who participated in the Commission’s process”); McCarthy, supra note 1, at 245-46 (contending that demanding a “public apology and a renunciation of past crimes will strengthen democracy and foster a human rights culture” while lamenting that the remorseless testimonies of some apartheid members who were granted amnesty “have done little to foster reconciliation”).
36 See infra Part IV. For an account of the basic needs a crime victim that has immediately following a violation, see CHARLES FIGLEY, STRESS AND THE FAMILY: COPING WITH CATASTROPHE Ch. 1 (New York: Brunner/Mazel 1983).
III. THE RESTORATIVE JUSTICE MODEL

While restorative justice has been invoked to justify state-sponsored grants of amnesty in South Africa and elsewhere, the concept itself was created as an alternative theory of criminal punishment. The term “restorative justice” first emerged in the criminal context in a 1977 article written by Albert Eglash. In the article, Eglash defined what he viewed as the three basic types of criminal justice:

a. Retributive justice – justice based on punishment
b. Distributive justice – justice based on therapeutic treatment of offenders
c. Restorative justice – justice based on restitution, compensation, and on “making right the wrongs done”

In other words, if retributive theory demands punishment of the offender based on some moral imperative, and distributive (or rehabilitative) theory seeks to cure the offender of his disposition to commit crime, restorative justice seeks to make the victim whole and return to her something that was unjustly taken. In that sense, Eglash had created a new model of criminal justice more closely aligned with American civil law than with traditional Anglo-American criminal law.

Howard Zehr refines the theory of restorative justice by distinguishing it from the retributive model he claims dominates the current American legal system. Through the “retributive lens,” says Zehr, we view crime as “a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules.” By contrast, the “restorative lens” views crime as “a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.” These definitions highlight two of the primary characteristics of restorative justice that distinguish it from traditional criminal justice theories: that criminal behavior primarily violates a personal relationship between victim and offender rather than an abstract relationship between the offender and the state, and that justice is best achieved by first focusing on the needs of the victim as well as the wrongs of the offender.

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38 Eglash, Beyond Restitution, RESTITUTION IN CRIMINAL JUSTICE 91.
39 See ZEHR, supra note 4, at Ch. 10.
40 Id. at 181.
41 Id.
A. THE PRIVATE NATURE OF CRIME

Traditional criminal justice theories view crime as a violation of the relationship or “social contract” between the offender and the state. Thus, criminal trials are prosecuted by the state and not the victim. However, restorative justice suggests that crime “represents a ruptured relationship between the victim and offender. Even if they had no previous relationship, the crime creates a relationship.” Restorative justice theorists recognize that crime also harms communities and violates social norms larger than the individual victim, but considers this violation ancillary to the harms done to the victim and to the interpersonal relationship between victim and offender. Thus, “[c]rime is not first an offense against society, much less against the state. Crime is first an offense against people, and it is here that [criminal justice] should start.”

This private conception of crime creates an interesting (and often problematic) situation for states seeking to achieve restorative justice through amnesty. As a matter of moral and legal right, only states have the authority to grant amnesty to criminals. However, the state’s role in a restorative justice regime is somewhat truncated, because the initial focus is on the private individuals involved in the crime (the victim and the offender) and not on the state or the citizenry it represents. Thus, a state can only further restorative justice goals through amnesty if it serves the interests of the victim – and to a lesser extent, the offender. The state plays the role of facilitator (much like in U.S. civil law) and does not represent society as a party to the proceedings. This limited state role can present problems when amnesty does not adequately address the victim’s needs, or when the victim uses amnesty to leverage negotiations with the offender.

B. THE FOCUS OF RESTORATIVE JUSTICE

As the name implies, restorative justice seeks to restore the individual to the just condition she enjoyed before the offender committed the crime and created injustice. Generally, crime creates a wrong (an injustice), and restorative theorists ask, “What can be done to make things right (or

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43 The community remains involved in a restorative justice regime insofar as it defines the wrong and helps define an appropriate remedy/response by creating a restorative justice system. By the phrase “private nature of crime” I refer to the restorative justice view that the crime itself is a private act that harms primarily private individuals (victim and offender), and only secondarily harms the “public community.” See id.

44 Zehr, supra note 4, at 181.

45 Albert W. Dzur & Susan M. Olson, Revisiting Informal Justice: Restorative Justice and Democratic Professionalism, 38 Law & Soc’y Rev. 139, 139 (2004) (explaining that restorative justice “decenters the focus of criminal justice from the offender breaking a law of the state to the harm caused the victim and community”).

46 Zehr, supra note 4, at 182.


48 John Braithwaite, Standards for Restorative Justice, Prison Fellowship International: Restorative Justice Online, http://www.restorativejustice.org/resources/docs/braithwaite (last modified Aug. 26, 2005) (emphasizing that, for a model to do more than “masquerade as restorative justice,” it must allow all stakeholders to have their voices heard and interests genuinely considered).

49 One might argue that democratically elected state actors represent society by creating the restorative justice amnesty proceeding in the first place. This argument misses the point. By creating a certain judicial system, the state reflects society’s preferences for how to rule on a given matter; it does not reflect society’s preferences for what that ruling should be.

50 See also Van Ness, supra note 42.
It is important to recognize, especially in the context of amnesty, that the answer to this question is not always, “We should punish the offender.” More specifically, restorative justice focuses first on repairing the harm done to the victim and to the relationship between victim and offender before considering the needs of the offender or of the state. This approach reflects the restorative theorist’s priorities regarding which harms are most in need of repair. Zehr explains that crime creates four basic types of harm that should be addressed in descending order:

- Harm to the victim
- Harm to the interpersonal relationship (between victim and offender)
- Harm to the offender
- Harm to the community

Restorative justice strives to address and repair each of these harms, but Zehr recognizes that no solution can adequately heal all of these wounds in all circumstances. In those cases, we should aim to achieve “approximate justice” by focusing on each harm in order of priority. This hierarchical view of harm should especially inform states seeking to achieve restorative justice through amnesty, as amnesty almost always represents an acknowledgement that full justice is unattainable. Thus, amnesties based on a theory of “approximate restorative justice” should, at a minimum, ensure that amnesty will repair the harm done to the victim.

What harms, then, has the victim suffered, and what needs does she have? Obviously, victims’ needs differ with the individual and with the circumstances, but some common needs exist among nearly all violent crime victims. The most obvious and tangible need is for compensation for loss, whether that compensation is financial, material, or symbolic. Some compensation (payment of medical expenses) may be more tangible than others (repayment for psychological scarring), but all forms of assistance can help the victim recover. Beyond compensation, some studies suggest that violent crime victims most immediately need answers. “What actually happened? Why me? Did this person have something personal against me? Is he or she coming back? What happened to my property?” Gathering this information can help victims make sense of the assault and “provide an entrance on the road to recovery.”

Along with compensation and information, victims need “opportunities to express and validate their emotions: their anger, their fear, their pain.” These feelings encompass and

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51 ZEHR, supra note 4, at 186.
52 Id.; Ron Claassen, Restorative Justice 1, http://www.fresno.edu/pacs/docs/restj1.html (last viewed Apr. 16, 2006) (creating a restorative justice goals hierarchy that places the needs of the victim ahead of the needs of society).
53 ZEHR, supra note 4, at 184.
54 Id.
55 Id. at 188. See also John Braithwaite, Restorative Justice: Assessing Optimistic and Pessimistic Accounts, 25 Crime & Justice 1 (1999) (acknowledging that restorative justice oftentimes cannot completely restore the victim, rehabilitate the offender, and mend society).
56 For example, most crime victims feel a basic need for justice, because it “provides a framework of meanings that make sense of experience.” Michael Ignatieff, Imprisonment and the Need for Justice, address to Canadian Criminal Justice Congress, Toronto, Canada (1987). See also FIGLEY, supra note 36, at Ch. 1.
57 ZEHR, supra note 4, at 26-27.
59 Id.
60 ZEHR, supra note 4, at 27.
61 Id.
express the harm caused by the violation, and being able to verbalize this harm helps begin the recovery process. Similarly, victims need to feel empowered. Violent crime degrades victims and damages their dignity and autonomy. A very tangible method of empowerment involves creating a safe environment so that the victim no longer feels under threat of attack. As part of regaining personal power, the victim needs to feel in control of her environment, and safety helps in that endeavor.

Perhaps most prevalent in victims is the need for justice. This need can take many forms, including the need for vengeance, the need for acknowledgement of the act’s wrongness, or the need to be heard and affirmed – to have one’s self-worth validated through “truth-telling.” No matter how a victim defines her “need for justice,” implicit is the need to know that steps are being taken to rectify the situation and ensure that it does not recur. This need for justice derives from our inherent need to make sense of the world; random violent acts turn the victim’s world upside down, and “justice provides a framework of meanings that makes sense of experience.”

C. THE GOAL OF RESTORATIVE JUSTICE: RESTORATION

With all of these needs in mind – restitution, answers, validation, empowerment, justice – how does restorative justice meet these needs? At the heart of restorative justice is the belief that a criminal justice system can only meet these needs by healing the victim and restoring her to her original state. Theorists use several metaphors to make this point. Dave Worth talks about the wound crime inflicts, explaining that “[n]ew tissue must grow to fill the space where the old was torn away.” Wilma Derksen states that “[c]rime creates an emptiness, so justice is filling a hole.” In other words, true justice sees how much damage has been done to the victim and restores her to the position she was in before the crime occurred.

As important to this description of what restorative justice does is what it does not do. David Van Ness explains that traditional justice systems “seldom deal with the wound. We try the offenders when we catch them. And we sometimes send them to prison . . . So now we have two wounds

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62 Book, supra note 58.
64 Many victim / survivor support organizations stress the need to regain control following a violent assault, because “[t]he assailant stepped into the victim/survivor’s life and took control.” The Aurora Center for Advocacy and Education, Common Feelings of Victims/Survivors Who Have Been Sexually Assaulted, available at www.l.umn.edu/aurora/commonfeelings.pdf (last viewed Apr. 28, 2007). Safety is a necessary precondition of regaining control, because “[h]ealing cannot start until [the victim] begins to feel safe.” The Center for Global Education, SAFETI On-line Newsletter, Treatment of Sexual Assault in College Students Studying Abroad, available at http://www.globaled.us/safeti/usc_art2.html (last viewed Apr. 28, 2007.).
66 ZEH, supra note 4, at 28.
67 Id. See also Book, supra note 58.
68 See Ignatieff, supra note 56.
70 ZEH, supra note 4, at 189; see Dave Worth et. al., The Green Manual (MCC Pilot Project), http://www.restorativejustice.org/articlesdb/articles/6053 (last viewed May 1, 2006).
and no healing."  

Restorative justice theorists believe that the traditional regime of focusing time and money on finding, apprehending, and punishing the offender is inefficient, because it both ignores the needs of the victim and “wounds” the offender. Instead of healing the one wound that the crime created, traditional criminal theorists create a second wound by incarcerating the offender.

This reasoning highlights why restorative justice has been so closely linked with amnesty. The restorative justice rationale only sees benefit in punishing the offender when the punishment addresses the victim’s needs; if punishment does not restore the victim, resources should be used more productively to help the victim and potentially repair the relationship between victim and offender. In the case of mass atrocities (war crimes, crimes against humanity, genocide), this rationale frees up lots of resources that would otherwise be used to put together a lengthy and complex prosecution, to gather evidence, and to try many hundreds or thousands of people. Through restorative justice, states can grant amnesty and focus on the truly important part of the crime – the victim.

IV. CRITIQUE OF RESTORATIVE JUSTICE AS A JUSTIFICATION FOR AMNESTY

Restorative justice theorists recognize the importance of holding criminals accountable, but deny that punishment is the most effective method of accountability. Moreover, they see this task of holding criminals accountable as less important than repairing any harm suffered by the victim. Amnesty provides a way for states to sidestep the obligation to punish offenders and focus on the primary goal of restorative justice – restoring the victim. However, amnesty often fails to address the victim’s needs, and in many cases amnesty actually frustrates rather than furthers the goals of restorative justice.

A. STATES CANNOT EFFECTIVELY ADMINISTER TRADITIONAL RESTORATIVE JUSTICE

The essence of restorative justice defines crime as a violation of a private relationship that exists between two individuals – the victim and the offender. While the criminal may have committed a wrong against society or ruptured the relationship between him and the state, these harms are considered secondary to the harm done to the victim and to the relationship between victim and offender. Thus, restorative justice aims to heal the victim by meeting her individual needs and

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72 David Van Ness, supra note 42.
73 Id. (“the prisoners who are being released discover that the community cannot accept them as... ex-prisoners, so they hide that part of themselves. More wounds.”).
74 Id.
76 See Van Ness, supra note 42.
77 Minnow, supra note 9, at 37-42 (remarking that prosecuting large scale war crimes like those committed in Rwanda, wherein 120,000 prisoners await trial for genocide, would take untold amounts of resources and would likely lead to patently selective and arbitrary prosecutions).
78 Daniel W. Van Ness, New Wine and Old Wineskins: Four Challenges of Restorative Justice, 42 CRIM. L. FORUM 251, 251 (1993) (observing that dissatisfaction with traditional criminal justice regimes lends credence to the argument that restorative justice systems may best hold offenders accountable and heal victims).
79 Wilson, supra note 1, at 547 (noting that, “by forgoing retribution, restorative justice denies victims an important right to determine and engage in morally condonable processes aimed at restoring their dignity”).
80 ZEHR, supra note 4, at 188.
repairing the broken relationship through understanding, forgiveness, and reconciliation. A conditional amnesty grounded in these restorative justice principles would address both the needs of the victim and those of the relationship between victim and offender. Depending on the needs of the victims (and thus, the conditions of the amnesty), it would empower victims by ensuring their safety, allowing them to receive restitution, and giving them an opportunity to get answers and be heard. The amnesty would also facilitate reconciliation of the relationship between victim and offender, likely by facilitating voluntary meetings between the two parties to discuss their respective hostilities.

Whether or not placing these sorts of conditions on amnesty actually meets the needs of victims, these amnesty structures suffer from a procedural defect. Restorative justice inherently is about the private needs of two individuals, and as a theory that “deals with the essentially private concepts of forgiveness and the will to reconcile . . . it is hard to see how restorative justice can work as a public concept, or how it can be ‘administered’ by an organ of the state.” If the state determines that an offender should not receive a traditional punishment as soon as the offender meets a certain number of conditions, then restorative justice can only be achieved if completion of those conditions restores the victim. It follows, then, that restorative justice can only be achieved in the amnesty context if the victim’s needs do not include a retributive desire for incarceration. Thus, restorative justice through conditional amnesty can only be achieved if the victim is willing to forgive the offender and foreshow punishment. While the state remains involved insomuch as it authorizes restorative justice and gives discretion to commissions to impose flexible sanctions, the victim’s act of forgiveness is a purely private one that does not involve the state or the community – precisely because the harms done to the state and the community are not immediately relevant. How, then, can a public entity like the state act to forgive an offender on behalf of the victim? Unlike in the traditional criminal justice context, where the state acts on behalf of the community to assert that the criminal has wronged the entire society, restorative justice defines crime in private terms without regard to society. Therefore, the state should not forgive the offender on behalf of the victim, but simply provide the victim with an opportunity to forgive.

Proponents of South Africa’s Truth and Reconciliation Commission argue that the TRC merely facilitated private forgiveness by placing the victim and the offender together in a mediation. From there, the victim asserted her needs, the offender expressed remorse (or not), and the victim forgave the offender (or not). In reality, however, many victims claimed they were pressured by the state to forgive their attackers, thus creating the public appearance of

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81 Id.
83 Stuart Wilson, supra note 1, at 544-45.
84 Victims often feel an intense desire for retributive justice, and often want to see their attackers incarcerated to give them a “sense of safety.” See Zehr, supra note 4, at 26-27.
85 This ability to forgive “will clearly not be in every victim’s power to achieve.” Wilson, supra note 1, at 538 (“Forgiveness involves a conscious mastery of anger; it marks a moral transformation on the part of the victim . . .”).
86 See generally supra Part III.
87 DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 118 (Doubleday 1999) (emphasizing that the Commission mediations between victim and offender showed that “we can indeed transcend the conflicts of the past, we can hold hands as we realize our common humanity”).
88 McCarthy, supra note 1, at 244-46.
personal forgiveness. While the Commission never directly commanded victims to forgive their attackers, “the ostensible – almost fanatical – promotion of forgiveness and reconciliation by the Commissioners could not but give victims the impression that forgiveness was hoped for, perhaps even expected of them.”

This type of heavy handed state coercion can be expected once the state takes over the execution of “private forgiveness.” Just as a traditional criminal justice system aggressively competes to “ferret out crime” and punish the offenders, a restorative justice system will aggressively pursue a policy that nets the highest possible total of reconciled relationships. In a results-centric democratic polity, especially when politicians are responding to widespread human rights abuses like apartheid or genocide, this type of coercive pressure is likely to be expected.

B. AMNESTY OFTEN FAILS TO MEET VICTIMS’ NEEDS

This tension between the TRC’s justifications and actual practices highlights a very real problem with defending amnesty through restorative justice. Although restorative justice claims to promote healing by focusing on the needs of the victim, in reality the victim’s needs are often not met by granting amnesty to her attacker. On the contrary, many (if not most) victims of violent crime feel the “need” for some kind of retributive justice. By punishing the offender, the state acknowledges the wrongness of his actions and the inherent self-worth of the victim. Many victims describe this acknowledgement of their dignity as instrumental in their recovery from the abuse they suffered. Amnesty, however, neither acknowledges the immorality of the offender’s actions nor the dignity and self-worth of the victim. This failure is most acute when the state grants amnesty despite the offender’s refusal to admit wrongdoing and the victim’s refusal to forgive.

Other victims express the need to feel safe again, at least from their attackers. Often a victim’s first, most natural response to crime is the need “to feel like life makes some sense and that they are safe and in control.” Traditional punishment meets this need by incapacitating the

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89 Wilson, supra note 1, at 548 (pointing out that forgiveness often appeared on the TRC’s agenda “before the given perpetrator had even been identified – let alone confessed and given an opportunity to show remorse”).

90 Id. See also RICHARD WILSON ET AL., THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE 120 (Cambridge University Press 2001) (recalling examples of the TRC, and often Archbishop Tutu himself, praising victims’ lack of “anger or desire for revenge” when forgiving attackers).

91 The problem of coercion may not be as prevalent in more localized restorative justice regimes. See Albert W. Dzur & Alan Wertheimer, Forgiveness and Public Deliberation: The Practice of Restorative Justice, 21 CRIM. JUSTICE ETHICS 3 (2002) (focusing on the experiences of Vermont’s restorative justice program in arguing that forgiveness is a public good that has communicative and social dimensions and can be advanced through public mediation). The Vermont experience shows that the public, through local government, can legitimately advance the interests of restorative justice without pressuring victims to forgive. But the threat of coercion certainly is more pronounced in the highly public, closely scrutinized, and nearly always controversial context of state-sponsored amnesty.

92 McCarthy, supra note 1, at 250 (noting that “more than half [of victims] believe the ‘perpetrators’ testifying before the Commission should stand trial. This sentiment is particularly strong among Black South Africans.”).

93 Id.

94 This is true, at least from a retributive perspective.

95 Figley, supra note 36, at Ch. 1.

96 ZEHR, supra note 4, at 27-28.

97 Id.
offender, thus providing the victim with absolute assurances of safety. Amnesty, on the other hand, gives offenders the right to live freely and reintegrate into society as he sees fit. This damages the victim in two principal ways. Most acutely, it deprives the victim of the feeling of safety that she so desperately needs in the immediate aftermath of a violation. But amnesty also exacerbates the already overwhelming feeling that life makes no sense. Many victims of abuse complain that their experience has left them feeling that life is random and senseless. The notion that a just, democratic society would allow a violent attacker to walk free and participate in the social order with innocent people (including the victim) simply perpetuates this feeling.

One might suggest that a partial or probationary amnesty could sufficiently give victims a sense of safety, particularly if the probation called for harsh punishments for recidivists. This type of “partial punishment” might also serve as official acknowledgement of the act’s wrongness and the victim’s self-worth. However, it would no longer be amnesty. Amnesty, by legal definition, refers to “an act of sovereign power immunizing a person from criminal prosecution for past offenses.” By immunizing the offender from punishment, the state forever loses its ability to penalize him for his actions. Moreover, amnesty “obliterates an offense before conviction; and in such case, he stands before the law precisely as though he had committed no offense.” By contrast, probation both recognizes the fact that the offender has committed the offense and exacts punishment for that offense, minor as it may be. A state might require an offender to serve a probation as a precondition to amnesty, but it would be the probation – and not the amnesty – that provides safety and acknowledgement of wrongdoing for the victim.

C. TRADITIONAL RESTORATIVE JUSTICE UNFAIRLY IgNORES THE RIGHTS AND NEEDS OF THOSE NOT “DIRECTly” AFFECTED BY THE CRIMINAL ACT

Restorative justice conceptualizes crime as primarily a violation of the private relationship between victim and offender, and only secondarily as a violation of the relationship between the offender and the larger community. Unlike traditional criminal prosecutions, restorative justice programs are not arranged as adversarial proceedings between the offender and the community (the state); indeed, the community is not officially represented at all. While the state may facilitate a restorative justice program, only the offender and the victim (if she so chooses) actually participate. Thus, other members of the community who were not “directly” affected by the criminal act have no official standing to have their voices heard and their opinions considered.

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98 Id.
99 See McCarthy, supra note 1, at 250-252.
100 Gwen K. Young, Amnesty and Accountability, 35 U.C. DAVIS L. REV. 427, 482 n.20 (quoting Michael P. Scharf, supra note 3, at 508).
102 Of course, the state retains the right to punish for the offense if the probation contains provisions for harsh punishments in the event of recidivism. Zehr, supra note 4, at 188. If the punishment is determined in part by reference to the past offense, the offense certainly has not been “obliterated.”
103 This concept of “partial amnesty” accompanied with probation sounds more like an official pardon. For a discussion distinguishing amnesty from pardon, see Freeman, supra note 100, at 524-27.
104 See supra Part III.
105 Braithwaite, supra note 48, at 35-43 (describing restorative justice as a system that involves participation among all “stakeholders,” including victim and offender, but not state).
106 Id.
This failure to acknowledge the impact the crime has on the larger community unfairly ignores the needs of those “indirectly” affected by the act, specifically the need to feel safe from future criminal activity. Under a traditional punishment scheme, incarceration creates a safer situation for all members of the community by temporarily incapacitating the offender, thus making it impossible for him to commit crime. In a restorative justice regime, however, the state does not incapacitate the offender, and only the victim has the opportunity to express whether this alternative to punishment creates a sense of safety.\textsuperscript{107} The victim may feel safe enough to let the offender go free (possibly because she gained the offender’s trust through a face to face meeting), but the victim’s relative sense of safety says nothing about the safety of the larger community. This especially is true when one considers that no community representatives had similar opportunities to gain the offender’s trust; some might feel more trusting of the offender after observing a restorative justice meeting, but neither the victim nor the facilitators of the meeting officially act as proxies for the community interest.

The South African government similarly structured its Truth and Reconciliation Commission without adequately recognizing the needs of non-victim individuals in the community.\textsuperscript{108} While the hearings themselves were made public for the community to see, only the offenders and the victims participated.\textsuperscript{109} Offenders applied for amnesty and publicly disclosed their involvement in apartheid, victims often made statements, and then Commission officials determined whether to grant amnesty. No other individuals participated in the hearings, nor were they parties to the amnesty deliberations.\textsuperscript{110}

One might consider restorative justice, at least in the context of a broad, state-sponsored amnesty program, as employing a group-based conception of the “victim” that incorporates both the actual victim and the larger community that was implicitly victimized by the act. Thus, in some small way the actual victims represented and acted on behalf of the entire community, and determined the best course of action for the community. This argument has merit, but it requires that one adopt a looser form of restorative justice that recognizes more than the needs of the immediate victim.\textsuperscript{111} If one is to acknowledge the victimization of the broader community, one must allow representatives of the “indirectly affected” victim group to participate in the hearings, deliberations, and decisions. While actual victims and indirectly affected victims share some characteristics, they have distinct relations to the offender and the criminal act. These distinct relations create different needs; thus, a truly group-based restorative justice regime requires input and consideration of all these victims’ different needs.

V. TOWARDS A Refined RESTORATIVE JUSTICE AMNESTY REGIME

The above discussion highlights some of the problems with justifying an amnesty regime like South Africa’s on traditional restorative justice theory. States have difficulty adequately

\textsuperscript{107} For example, AZAPO, a mostly Black anti-apartheid movement, frequently spoke up on behalf of the Black South African community in opposition to grants of amnesty because “it is like turning the knife after the initial blow to the heart.” However, no members from AZAPO who were not immediately victimized by the amnesty applicants were granted the opportunity to speak at the hearings. See McCarthy, supra note 1, at 252.

\textsuperscript{108} Id. See also supra Part IV.

\textsuperscript{109} Some have argued that “the truth commission’s mandate misidentified the main victims . . . of apartheid by narrowly focusing on individual acts of extraordinary violence.” Nagy, supra note 1, at 13 (citing Mahmood Mamdani, Reconciliation Without Justice, SOUTH AFRICAN REVIEW OF BOOKS 46 (1996)).

\textsuperscript{110} Id.

\textsuperscript{111} Restorative justice recognizes the needs of the offender and the needs of society, but only after recognizing the needs of the immediate “victim.” See ZEHR, supra note 4, at 188.
administering a private conception of justice through such a broad public program as amnesty. These programs often fail to address victims’ needs, which is the primary goal of restorative justice, and they rarely address the needs of others in the community who, though not directly victimized, were affected nonetheless. Only a refined theory of restorative justice – one that both redefines “victim” broadly to encompass the surrounding community and allows victims to direct amnesty proceedings – can justify a conditional amnesty.

A. ALLOW VICTIMS, NOT OFFENDERS, TO APPLY FOR AMNESTY

A state administering a restorative justice regime will work just as hard to achieve success as one administering a retributive justice regime. In turn, the state might be given to manipulating victims to manufacture reconciliation. This type of pressure to forgive in South Africa’s TRC has been well documented.\(^ {112} \) To limit this sort of heavy handed state coercion, states should give victims greater control over the amnesty process.

One can envision an amnesty regime in which the victim, not the offender, applies to forgive her offender as a precondition to the offender’s attainment of amnesty. This way, the victim ensures that the state does not ignore her need for traditional justice (punishment); if she does not wish for the offender to receive amnesty, she need not apply. It also creates incentives for offenders to work closely to meet the victim’s needs, including paying restitution and providing answers. Moreover, this system helps to weed out disingenuous expressions of remorse more effectively than a system in which the offender applies for and receives amnesty after acknowledging the wrongfulness of his conduct. After the victim’s needs have been met and she is sufficiently willing to forgive the offender and repair her relationship with him, the state can step in and grant amnesty. This system achieves the restorative justice goal of meeting the victim’s needs without the threat of victim manipulation by the state; the real restorative work is done in private between victim and offender, and the state steps in merely to facilitate the restoration.

One problem with this regime is the risk of blackmail. If a citizen’s freedom from state confinement rests solely in the hands of the victim, one must begin to seriously worry about the potential for abuse. For instance, the victim may claim that her wounds have not sufficiently healed until her offender’s bank account has been emptied, or until the offender has been repeatedly publicly shamed in a way that is tantamount to torture. While the state can certainly set limits on the scope of private mediation and the demands of victims within them, offenders are likely to accede to whatever demands the victim has when his very freedom is the thing being held from him. States can attempt to cap the amount of financial restitution victims receive, but states cannot legitimately achieve restorative justice by forcing victims to agree to forgive and grant amnesty to their attackers. Thus, the carrot (freedom) remains in front of the offender, and the stick (blackmail) remains largely unchecked.

B. ALLOW “INDIRECTLY AFFECTED” VICTIMS TO HAVE THEIR VOICES HEARD

State controlled amnesty proceedings risk ignoring victims’ needs, and thus failing to achieve the goals of restorative justice.\(^ {113} \) Yet, victim controlled proceedings like the one described above contain the potential for blackmail. One way to ensure that victims both have their needs met and are restrained from abusing the system is to expand the definition of “victim” to include those in the community who were indirectly affected by the criminal behavior. Traditional restorative

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\(^{112}\) Wilson, supra note 1, at 548-49.

\(^{113}\) See supra Part IV.
justice mediations, as well as amnesty proceedings like South Africa’s, invite all “stakeholders” to participate and have their voices heard, but only recognize the offender and the directly violated victim as legitimate stakeholders.\textsuperscript{114} By acknowledging that others in the community are negatively impacted by crime and inviting community representatives to participate in amnesty proceedings, the state can limit the directly affected victim’s ability to blackmail the offender. Community members, while shaken up by the crime, will not have suffered as significant a harm, and thus will likely have less incentive to abuse the offender. Moreover, any financial restitution given to the “community victims” likely will be nominal in comparison to that received by the immediate victim, creating even less incentive for blackmail.

This group-based conception of the victim also more completely addresses the goals of restorative justice, at least with respect to amnesty. Amnesties are often granted in response to widespread, public atrocities that affect nearly everyone in the community; to deny community representatives the opportunity to express their needs as victims in amnesty proceedings would be to give an incomplete account of the “wounds” created by the crime.\textsuperscript{115} This, in turn, would cause the state to address only some victims’ needs, leaving others wounded. By employing a refined, group-based restorative justice amnesty regime, the state can more effectively address the needs of victims, and thus, the requirements of restorative justice.

VI. CONCLUSION

Traditional restorative justice views crime as a private violation between individuals, and contends that the wounds of crime can best be healed through mediations focused on the private stakeholders involved, rather than the state or the larger community. This private conception of justice seems an uneasy fit for a state sponsored and administered proceeding like amnesty. Indeed, trying to incorporate traditional restorative-justice ideals into an amnesty regime creates many problems, both conceptual and practical. States have difficulty facilitating the private acts of forgiveness inherently needed in restorative amnesty systems, and these systems often fail to adequately address the needs of victims – both the immediate victims and those within the larger community.

However, a refined restorative justice that employs a group-based conception of victim-offender mediation can effectively address victims’ needs in amnesty proceedings, especially when victims have more direct control over the proceedings themselves. By allowing victims to apply togrant amnesty to their attackers, the state can ensure that victims’ needs are being both heard and met. And by including community representatives in the amnesty deliberations and decisions, states can more completely address victims’ needs and reduce the potential for abuse. Only through this public conception of restoration can states legitimately grant amnesty in the name of restorative justice.

\textsuperscript{114} See Braithwaite, supra note 48, at 35-43.

\textsuperscript{115} Ronald C. Slye, supra note 12, 175 (“Most recently . . . amnesties have been used to protect individuals from accountability for some of the worst human rights atrocities in the history of humankind.”).