Chapter 1

Introduction

Children are perhaps the most vulnerable population group to crime. The overall risk of being victimized before reaching the age of 18 is higher than as an adult (Finkelhor and Dziuba-Leatherman 2001). In a national sample of American children aged 2–17 years, over a half of the participants (530 out of 1000) experienced some kind of assault during the study year, with higher rates for boys than for girls; 1 in 10 experienced injury as a result. About one fifth also experienced bullying. One in four children experienced property victimization and one in 8 a form of child maltreatment (Finkelhor et al. 2005). Multiple victimization is very common, with sexually assaulted children being most likely (97 percent) to have additional victimization such as assault, maltreatment and property victimization (Finkelhor et al. 2005).

At the same time, only a small portion of child victims report the crimes against them, especially when they have been sexually assaulted or abused within their families (Fortin 2003, p. 519). Moreover, children who find the courage and disclose their victimization often experience the criminal justice system as further traumatizing them (Morgan and Zedner 1992, Fortin 2003, Herman 2003, Zedner 2004). Even when stress reducing techniques are used, children of various ages are excluded from the process, are not consulted and are treated, at best, as objects of protection rather than as stakeholders. Furthermore, child victims are often left without emotional healing, because their specific needs and the developmental consequences of their victimization are not considered. Only very rarely do they experience a sense of justice and closure following their involvement in the criminal justice process (Herman 2003, Groenhuijsen 2004).

In the research arena, childhood victimology (Finkelhor and Dzuiba-Leatherman 1994) is a neglected field of victimology. While much attention has been given in recent years to child abuse — both physical and sexual — other types of crime against children, such as physical assaults, emotional abuse and neglect, have been studied to a much lesser extent. Moreover, the phenomenon of childhood victimization has not been studied as a whole, with only very few exceptions (Morgan and Zedner 1992, Finkelhor et al. 2005).

Perhaps one of the reasons for these problems in both practice and research is the failure to regard child victims as human rights holders. Efforts to punish those who harm children and to minimize the process–related side effects are based on assumptions regarding the vulnerability of children and their special needs for care.
and protection, and do not address children’s wishes and their need to practice their evolving capacities (Freeman 1983, p. 105). Similarly, studies on childhood victimization typically focus on issues such as children’s re-victimization and their status as witnesses, while neglecting others such as children’s understandings of the process and their ability to engage in decision-making processes (Melton and Limber 1992, pp. 181–182). There is, then, a need for a broader perspective through which to examine existing and developing practices addressing childhood victimization, one which might expand the horizons of related research as well.

1.1 Thesis aim

Accordingly, the aim of this thesis is to explore better ways to address the difficulties faced by victimized children, using an integrated needs–rights approach. In addition to a critical analysis of the criminal justice process, this thesis examines the appropriateness of restorative justice as a means to address the needs and rights of child victims, and proposes some principles for action in restorative justice that might increase the likelihood of meeting the needs, as well as human rights, of child victims.

1.2 Thesis overview

Chapters 2 and 3 set the stage for the central instrument used to achieve the goal of the thesis — the needs–rights model, introduced toward the end of Chapter 3. These two chapters might be seen as creating the glossaries of the two fields, namely, human rights and psycho-social needs that are used in the rest of the thesis. Chapter 2 introduces the rights discourse, with the competing arguments for and against its use in the context of children. Two approaches to rights — Martha Minow’s relational rights and Katherine Hunt Federle’s empowerment rights — provide strong justifications for, as well as more fine-tuned definitions of, the kind of rights discourse that will be used throughout this thesis.

Indeed, this thesis employs a rights discourse in which ‘rights’ are seen in their broad meaning and are intertwined with ‘needs’. These rights include self determination of children (through participation), but protection and development as well. They include respect for the child as an individual, but also the right to family and community support. Accordingly, theories linking children’s rights and their needs are discussed.

Once the case for a rights discourse has been established, Chapter 2 moves on to introduce the main international human rights instrument that mirrors such a broad rights approach — the 1989 UN Convention on the Rights of the Child, and discusses six of its provisions which have been chosen to represent the rights of child victims in this thesis.

A strict rights–oriented approach, however, as broad as it may be, does not provide a rounded solution for what child victims face following their victimization. Accordingly, Chapter 3 moves to a different arena, that of sociology and psychology.
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Using psycho-social literature, this chapter reviews theories and empirical findings regarding the effects of crimes on children and their needs in the healing process. Toward the end of the chapter, an integrated model of children’s human rights and their psycho-social needs is introduced, which links each human rights principle to empirical findings on children’s needs following victimization.

The following chapters use, in different ways, this needs–rights model. Chapter 4 describes the status of child victims in criminal justice processes in adversarial legal systems. It provides a detailed review of the particular difficulties that they face, as well as some recent reforms and their levels of success. In its second part, the chapter deploys the needs–rights model to evaluate the criminal justice system. The chapter concludes with some thoughts about the contribution of the model as an evaluation tool and in uncovering the limited ability of the criminal process to address the full scope of the needs–rights of child victims.

Chapter 5 provides a description of empirical evidence about ‘what works’ in the field of restorative justice and child victims. The chapter reviews five case studies in which child victims have been involved in restorative settings, and discusses the central concerns and challenges that emerge from these cases and their evaluation studies. At the same time, these case studies demonstrate the great potential of restorative justice in meeting the needs and rights of child victims while maintaining their safety and wellbeing. Considering the potential, as well as the concerns, regarding the involvement of child victims in restorative justice settings, the lessons learned from these case studies are used in the next chapter in constructing recommendations for practice.

Accordingly, Chapter 6 returns to the needs–rights model, this time as a template for deriving subsidiary principles for action in restorative settings. Similarly to the methodology utilized in Chapter 4 regarding the criminal justice process, here too the model’s elements are grouped into four clusters, and each of them is analyzed to suggest such subsidiary principles. This analysis is followed by a more practical section, where eight heuristic principles are proposed for practitioners who want to conduct child–inclusive restorative justice.

The concluding chapter summarizes the central arguments of the thesis, recognizes the limitations of the suggested needs–rights model and its value, and finishes with some ideas for broader implications.

1.3 Thesis scope

While children of various ages present different challenges and may require very different responses, this thesis refers to all children aged from 3 to 18. This age threshold is based on Selman’s (1980) findings that three year old children are able to recognize that other people may have different viewpoints (see page 161), and Darby and Schlenker’s (1982) finding that at age three children are able to appreciate apologies (see page 70). Although children aged 0–2 are also human rights holders, their capacity to implement their rights in the terms developed in this thesis is limited.
This broad definition of childhood reflects the notion that all children are entitled to equal human rights. It is acknowledged, however, that there are vast differences in children’s capacities to exercise their human rights. Clearly, very young children cannot articulate their views in a way similar to that of school–age children and adolescents. Their capacity to make decisions is also very limited. Nevertheless, this thesis shows that even young children are able to form their views and express them in many ways.

Similarly, while different types of crime may pose different problems and varying levels of physical, emotional and financial consequences, this study is not limited to a certain type of crime. Rather, it looks at the full scope of childhood victimization. This includes all criminal acts against children such as sexual and physical assaults, abduction, robbery, theft, abuse and neglect. Other actions that involve coercion and force and would have been considered crimes if committed between adults, such as peer and sibling assaults, are also discussed. Corporal punishment, although considered violent and crime if committed between adults, is on the boundary of the definition of crime because most jurisdictions do not consider it a crime (Finkelhor and Kendall-Tackett 1997). While this thesis addresses the full range of childhood victimization, it also includes some more specific discussions about the unique challenges and concerns emerging from what is generally considered the most serious category of crimes against children, namely, sexual and physical abuse within the family.

While broad in the target population and definition of crime, the scope of this thesis is limited in other ways. First, it looks at criminal responses to child victimization, not child–protection proceedings or social–work services that typically follow child abuse cases. The forms of restorative justice that are discussed in this thesis all include an encounter (either direct or indirect) between the offender and the victim, and all aim at finding ways to repair the harm done to the victim and the community. There are, however, close ties between such processes and child protection restorative justice processes, particularly family group conferences. These are conducted largely in cases of child abuse and neglect and are aimed at finding ways to secure the safety of the child while maintaining, as much as possible, family ties.\(^1\) While these types of processes are not the focus of this thesis, the differentiation between the two contexts is often vague. Indeed, criminal child abuse and neglect cases where a restorative process occurs instead of the criminal process, can potentially address child protection issues such as a safety plan for the child. In other words, while this thesis discusses the feasibility of restorative justice as an alternative to the criminal process, it assumes that in cases where the crime has occurred within the family, restorative justice might also act as an alternative to child protective processes.

Second, this study is not located in any particular jurisdiction. It uses an international set of human rights norms as well as general psycho–social theories. Clearly, jurisdictions vary in their laws and procedures as well as existing practices, and this

\(^1\)Further explanation regarding the differences between child protection and criminal justice family group conferences is provided in Chapter 5.
thesis refers to specific legal systems only as examples. However, Chapters 4 (discussing the criminal justice process) and 5 (reviewing restorative justice programs) do refer to national and local practices, but they are limited to Western, adversarial legal systems only.\footnote{These are, mainly, The US, Canada, the UK, Australia and New Zealand.} Findings on the practices and approaches toward child victims in inquisitorial and non-Western jurisdictions are not included.

Finally, although this thesis discusses strategies to respect the needs, rights and wishes of child victims, it does not suggest that the needs, rights and wishes of other stakeholders are unimportant or should be given less weight. The emphasis on empowering children, listening to their views and including them in the process is intended to fill a gap in the literature and in practice, not to negate such approaches toward the other involved parties.

Two comments on the vocabulary used in this work are needed as well. First, the words ‘offender’ and ‘perpetrator’, which are used frequently in this study, have a broader meaning than their legalistic one. In the legal sphere there are important differences between ‘suspects’ (those investigated by the police for alleged crimes), ‘defendants’ (those prosecuted in court), and ‘offenders’ (those who have been found guilty in a criminal court). In this thesis, ‘offenders’ includes all three meanings, but this does not mean that the presumption of innocence is dismissed. This is for two reasons. Firstly, at least in the restorative context, ‘offenders’ are typically required to take responsibility for the crime as a precondition for holding the processes, and as a result their criminal conduct is undisputable. Secondly, this study focuses on victims’ experiences, and from their perspective, there is an ‘offender’ whether or not he or she have been identified, prosecuted and found guilty. It is acknowledged, however, that many ‘offenders’ do not meet the legal definition, and that they are entitled to be regarded innocent in the criminal process until (and if) they are found guilty.

Similarly, while the words ‘victim’ and ‘child victim’ are used regularly, it is noted that from a legal perspective, victims are regarded only as ‘alleged’ victims in the preliminary stages of investigation, since it is assumed that nothing is established until proven in court. Here too, however, a more inclusive meaning of the term is used, one that respects the personal perspectives of those who have experienced victimization (whether or not there is an identified perpetrator who has been found guilty). It is acknowledged, however, that not all ‘victims’ meet the legal definition of the word.

Since restorative justice is a relatively new paradigm in criminology, the following section provides a general introduction to the concept.
1.4 Restorative justice: definition and central principles

Born out of disappointment with both the retributive and rehabilitative justice paradigms, restorative justice has emerged as a ‘third lens’ (Zehr 1990, Strang 2002, p. 43), according to which

Crime is 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 (Zehr 1990, p. 181).

Restorative justice can be defined either as a process, or as a theory encompassing specific values and principles (Braithwaite and Strang 2001).

Tony Marshall provided the most widely accepted definition of the procedural aspects of restorative justice, according to which it is

... a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future (1999, p. 5).

According to Braithwaite (1999, p. 6), the parties with a stake in the offence are typically victims, offenders and the affected community; the damage to be restored is whatever the stakeholders see as needing to be restored.

The United Nations’ Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2002) provide a similar definition. A ‘restorative process’ is defined as

... any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative justice process include mediation, conferencing and sentencing circles (Article I (3)).

As to the principles underlying restorative justice, Morris and Maxwell argue that the critical values of restorative justice are:

... the primacy of victims, offenders and communities of care through their inclusion in decision-making processes about how to deal with the offending and its aftermath; acceptance by victims, offenders and communities of some community or collective as well as individual responsibility for the offending and/or the reasons underlying it; an increased understanding on the part of victims, offenders and communities of care of the reasons for the offending and its impact on others; respect for all the parties involved in the process and the avoidance of stigmatic shaming; acknowledgment of responsibility for the offending through making amends; the reduction of reoffending; the reintegration of offenders
Introduction and victims within their communities of care; and healing victims’ hurt. 
(Morris and Maxwell 2001, pp. 267–268)

Braithwaite (2003b, p. 8–13) suggests three different categories of values for restorative justice practices. The first group, called the ‘constraining values’, includes values that are essential for any process to be restorative. These are: non-domination; empowerment; enforceable upper limits on sanctions; respectful listening; equal concern for all stakeholders; accountability, appealability; and respect for fundamental human rights.

The second group of values, called ‘maximizing values’, represents favored results of restorative justice processes and are relevant measurements for evaluation of any such program. These are values that the participants should try to maximize. But they are not constrained to honor a certain level of the value; they can tradeoff one value to achieve a higher level of another. Values in this group include: restoration of property; emotional restoration; restoration of dignity; compassion; and social support. These principles, Braithwaite argues, are consensual, and are drawn from international human rights documents as well as from common values in existing restorative justice programs.

Finally, a third group of values includes forgiveness, remorse, mercy and censure. These are labelled the ‘emergent values’: they cannot be imposed and must only be acted upon voluntarily, otherwise they are worthless. Braithwaite’s categorization is helpful as it reflects a hierarchical structure in restorative values, with non-domination and empowerment at the top of the hierarchy.


Van Ness and Strong (1997) claim that a number of movements have contributed to the development of restorative justice theory. First, the informal justice movement called for the ‘return’ of the conflict from professionals (in particular lawyers) back to individuals, as had been the case in ancient legal systems (1997, pp. 16–17). Nils Christie (1977), for example, talked about the conflict as a property which had been stolen from the direct parties who lost the opportunity to resolve it in their own terms.

A second movement that contributed to the development of restorative justice, according to Van Ness and Strong (1997), is that of restitution as a preferred way of sanctioning offenders. Restitution as a sanction acknowledges the victim’s harm, provides a less intrusive alternative to incarceration, has rehabilitative potential for offenders, is relatively easy to implement and enforce, and might reduce revengeful crimes (Van Ness and Strong 1997, p. 18).

The victims’ movement has been another important force in the development of restorative justice theory (Van Ness and Strong 1997). The victims’ movement ad-
vocated increasing services and financial restitution for victims (mainly in Europe), and for more participation and other procedural rights in the criminal process (particularly in the United States) (Van Ness and Strong 1997, pp. 19–20, Strang 2002, pp. 26–33).

A fourth movement which Van Ness and Strong (1997, pp. 21–22) consider as critical in the development of restorative justice is that of reconciliation and conferencing — two informal justice practices that developed and gained popularity in the last thirty years. Victim–offender reconciliation or mediation programs emerged principally in the United States and involved direct encounters between victims and offenders, with the aid of a facilitator or a mediator. These Victim Offender Mediation (VOM) or Reconciliation Programs (VORP) typically included both restitution and some forms of reconciliation, and were received with considerable levels of satisfaction by both offenders and victims (Umbreit et al. 2001, Poulson 2003). Conferencing, in contrast, emerged from 1989 in New Zealand, and was influenced by traditional Maori practices. It was later adopted in Australia and linked with Braithwaite’s *reintegrative shaming* theory (Braithwaite 1989). Conferencing too has shown considerable success in addressing the interests of both victims and offenders, including in cases of serious crimes, although it has also been subject to criticism (Burford and Pennell 1998, Immarigeon 1999, Merkel-Holguin 2000, Kurki 2003, Maxwell et al. 2004).

A final movement which might have contributed to the development of restorative justice is what Van Ness and Strong (1997) call ‘social justice’ (1997, p. 22). This includes abolitionists and feminists who called for alternative responses to crime and a broader understanding of justice.

Indeed, it might be argued that restorative justice theory includes elements from each of these movements: 1. It promotes individual participation and empowerment and a shift from professional decision–making; 2. It emphasizes the importance of material reparation to the victim; 3. It treats victims’ needs and wishes as central; 4. It promotes a shift away from the punitive to a more restitutive approach. Restorative justice practices have developed around the two strands of reconciliation/mediation and conferencing, although a third strand, that of sentencing circles and healing circles, has also emerged, particularly in Aboriginal communities in Canada.4

Another theory which has been influential in the development of restorative justice is Tom Tyler’s *procedural justice* theory (1990). Tyler suggests that offenders who perceive their case as being dealt with fairly are less likely to re-offend; ac-

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3The three fundamental arguments of the *reintegrative shaming* theory (Braithwaite 1989, 2002a) are that first, tolerance of crime makes things worse; second, that stigmatization makes crime worse still; and third, that reintegrative shaming — whereby the actions of offenders are being condemned but at the same time offenders themselves are being acknowledged as accepted members of the community — prevents crime (2002a, p. 74).

4A more detailed explanation of these three most common forms of restorative practices will be presented in Chapter 5.
Accordingly, it is argued that since victims and offenders perceive restorative justice as fairer than criminal court processes because it involves people who support them rather than people whose role is to stigmatize them, restorative justice might be more effective in reducing crime (Braithwaite 2002a, pp. 78–79).

It may be concluded, then, that restorative justice puts the stakeholders — the victim, the offender and the relevant community — at the center of the decision-making process, thereby empowering them to take an active role in repairing the harm that resulted from the crime. The recurring notions of empowerment, active participation and non-domination apply to all participants, but importantly in the current context they apply to victims, including vulnerable ones.

The first step, however, of this thesis, is to explore the appropriateness of a rights rhetoric in the case of children. Accordingly, Chapter 2 discusses the human rights of children, and those of child victims in particular.