

Who Will Choose the End Words? Structuring Justice Amid Tragedy

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INTRODUCTION

On the morning of April 16, 2007, countless lives were devastated when Seung-Hui Cho, a senior creative writing major at Virginia Tech, fired 170 rounds of ammunition on campus, killing thirty-two students and teachers and physically wounding more than twenty-five people.¹ Since he shot and killed himself, the state did not initiate criminal charges against Cho. The governmental and institutional responses included an investigation by a panel appointed by sitting Virginia Governor Timothy Kaine, the creation of a pool of donations to provide financial compensation for those physically wounded and the families of those killed,² and civil litigation involving two

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1. Those who were killed the morning of April 16, 2007, include: Ross A. Alameddine, Christopher James Bishop, Brian R. Bluhm, Ryan Christopher Clark, Austin Michelle Cloyd, Jocelyne Couture-Nowak, Kevin P. Granata, Matthew Gregory Gwaltney, Caitlin Millar Hammaren, Jeremy Michael Herbstritt, Rachael Elizabeth Hill, Emily Jane Hilscher, Jarrett Lee Lane, Matthew Joseph La Porte, Henry J. Lee, Liviu Librescu, G.V. Loganathan, Partahi Mamora Halomoan Lumbantoruan, Lauren Ashley McCain, Daniel Patrick O'Neil, Juan Ramon Ortiz-Ortiz, Minal Hiralal Panchal, Daniel Alejandro Perez Cueva, Erin Nicole Peterson, Michael Steven Pohle, Jr., Julia Kathleen Pryde, Mary Karen Read, Reema Joseph Samaha, Waleed Mohamed Shaalan, Leslie Geraldine Sherman, Maxine Shelly Turner, and Nicole Regina White. Christine Lagorio, *List of Virginia Tech Shooting Victims: Students and Faculty Who Died in Blacksburg*, CBSNEWS (Apr. 19, 2007), <http://www.cbsnews.com/stories/2007/04/17/virginiatechshooting/main2693354.shtml>.

2. HOKIE SPIRIT MEMORIAL FUND, <http://www.vt.edu/fund/index.html> (last visited Feb. 8, 2011).

surviving families.³ As a former prosecutor and a student of restorative justice, I watched the establishment of these institutional responses.⁴

As the mother of a student of creative writing at Virginia Tech that morning, I also witnessed and participated in the creation of an inclusive meta-narrative, which provides the healing, the restoration, the investigation, and the peace that we seek from restorative processes. I discovered that some current theories and practices of restorative justice gravitate towards the institutional reactions to this tragedy, rather than the openly woven, rich, inclusive, and subjective response that emerged from within the community. In this Article, I will compare those responses, proposing that restorative justice has joined the dominant institutional response to harm by adopting underlying assumptions contained within western jurisprudence. I will suggest alternative sources for frameworks and definitions—those that emerged following this tragedy.

The investigation conducted by the panel extended beyond an inquiry afforded by conventional adversarial proceedings, yet remained narrow, tethered to the events of April 16, 2007. Those tethers also bind restorative justice to conventional procedures. Theories and practices of restorative justice must sever those restraints and foster new patterns of thinking that will not simply add

3. Victims may seek restitution following crime through three sources: civil litigation, crime victims' compensation programs, and restitution. Forty-six families are reported to have reached a settlement in this matter without filing suit. Two families of students who were killed elected to pursue damages through civil litigation. Michael Sluss & Tonia Moxley, *Missing Va. Tech Shooter Records Found in Former Counseling Center Director's Home*, ROANOKE TIMES (July 22, 2009, 9:43 AM), <http://www.roanoke.com/news/breaking/wb/212699>. It is unknown as to whether or not any compensation was provided through any state victim compensation program, however, most funds limit compensation to out-of-pocket expenses. No restitution would be awarded without a criminal prosecution. Restitution is usually ordered as a condition of probation. *See, e.g.*, 19.2 VA. ADMIN. CODE § 305.1 (2008). For a detailed discussion of restitution, see Richard C. Boldt, *Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY 969 (1986). In this instance, the families also received contributions through the "Hokie Fund." Sluss & Moxley, *supra*.

4. When referring to "restorative justice" within this Article, I am referring to a concept described by Howard Zehr which promotes principles including: a focus on harm and the consequent needs of the victims, the communities and the offenders; addresses "obligations resulting from the harm"; employment of "collaborative, inclusive processes"; involves all who are affected in the outcome; and attempts to "put right the wrongs." HOWARD ZEHR, *CHANGING LENSES* 270 (2005).

programs to our existing structures.⁵ This movement is consistent with restorative justice, which is more broadly rooted in rejecting assumptions about harms and prescribed roles that flow from those suppositions.⁶

I will confess up front: I am struggling to tell my story, as it intertwines with other stories. My method is simple, but difficult. Please bear with me.⁷

*April 16th started like a normal morning. (Maybe it was.)
Early. At my desk. Working.
My son Dash calls. He knows I would
Worry.*

5. DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE 6 (3d ed. 2006); *see also* Val Napoleon, *By Whom, and By What Processes, Is Restorative Justice Defined, and What Bias Might This Introduce?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 33, 34 (Howard Zehr & Barb Toews eds., 2004) (“Until its proponents have made profound shifts in thinking, restorative justice will remain trapped within Western rational thought, constrained by unexamined assumptions. We must challenge our assumptions about human nature and our relationships, and conceptualize restorative justice politically, socially, and economically in the larger world.”); *see also* Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 980 (1998) (reflecting that “my own understanding of feminist ideas suggest that a single answer will not and should not be forthcoming. Attention to context and particular settings and interests will be crucial.”).

6. *See, e.g.*, GERRY JOHNSTONE, RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES 87–92 (2002).

7. This is my account of one day in my life, April 16, 2007, and it changed everything. I hesitate to tell my story, how insignificant it seems. Ben Agger and Timothy W. Luke in the introduction for their collection of essays about the Virginia Tech shootings encourage me.

No matter how painful or critical, each account nonetheless needs to be listened to very attentively if we are to begin to hear what is now afoot in changes unfolding all around us. . . . Above all, we agree that something important happened at Virginia Tech, something that discloses disturbing truths about America today. We also agree that the trouble started before the shooter entered the university, and we concur that the troubles are not over.

Ben Agger & Timothy W. Luke, *Preface*, in THERE IS A GUNMAN ON CAMPUS: TRAGEDY AND TERROR AT VIRGINIA TECH, at vii, ix (Ben Agger & Timothy W. Luke eds., 2008). In constructing my own story, I am working to construct theory within and through the narrative, seeking theory grounded in experience. I am looking for a way to tell my story, and all the while construct a theory. “Yet I want a new form, however we categorize it, that can incorporate not only the narrative (as in story) and the theoretical (as in argument/essay), but also the lyrical, as well as the personal and factual, and even the absences and interruptions where meaning sifts and shifts.” Ruthann Robson, *Winged Taxonomy*, MEMOIR (AND), Spring 2007, at 94, 95.

*There's a sniper on campus—he didn't want me to hear it on
the news and worry.
At eleven I meet Martha for coffee. I tell her about the sniper,
she calls her son,
He's in class.*

Locked down. There's been a shooting.

*At home, checking the news . . . Dash calls . . . A Roanoke TV
station says three are dead.
And now another says twenty.
And the number rises.
The calls keep coming.*

*Aunt Gretchen's in Alaska, Dad's in Fredericksburg, and
Grandma's 96.*

They all say: "Is Dash okay?"

*And the emails—my former law professor in Boston, my
college roommate.*

"Please let me know all is o.k. Call me when you feel like it."

More stations. More dead. Thirty.

*It's cold and windy and the news keeps broadcasting the
image of
the same student (wearing a blue parka) walking along the
street as a "background" for their story.*

Who is he?

This innocent, "undamaged" student—

Backdrop for a tragedy. Walking along.

He looks as though he is going to class. Is he?

Dash calls. Close friends are accounted for.

But thirty-three people are dead.

Martha calls. She's a Hokie. She can barely move.

Pam and I run on the trail. Her husband and children are

Hokies. She says: "It feels so damned dark."

They'll call it a massacre.

(I think it sells papers better than tragedies.)

Poet and Virginia Tech professor Fred D'Aguiar:

. . . While those sirens keep building a wedding cake of sound.
I know there is more. I slice open the door to my office
To find the decorated girl gone and no one else around.
I zoom back to the Web for any news of what's going on
In my immediate vicinity, since I cannot trust the song

And dance of my senses. Then I hear a loudspeaker
Asking everyone to remain indoors and stay away
From windows and I know for sure it's a shooter . . .

—Fred D'Aguiar⁸

Poet and Virginia Tech professor Bob Hicok:

I heard from people after the shootings. People
I knew well or barely or not at all. Largely
the same message: how horrible it was, how little
there was to say about how horrible it was.
People wrote, called, mostly e-mailed
to say, there's nothing to say. Eventually
I answered these messages: there's nothing
to say back except of course there's nothing
to say, thank you for your willingness to say it

—Bob Hicok⁹

I. CHARACTERIZING HARM AS A CHARGE OR AN OFFENSE CONSTRAINS THE POTENTIAL FOR COLLABORATIVE AND RESTORATIVE PROCESSES

The United States' judicial processes address criminal wrongdoing through prosecution of the party determined by the state as responsible for the wrong. Narrowly characterizing the wrong as a

8. FRED D'AGUIAR, *CONTINENTAL SHELF* 52 (2009). Throughout this essay, I have included excerpts from the poets at Virginia Tech since they provide great wisdom and imagination through their poetry. This format requires that I use excerpts and for that, I apologize and urge the reader to explore the full text.

9. BOB HICOK, *In the Loop*, in *WORDS FOR EMPTY AND WORDS FOR FULL* 48 (Ed Ochester ed., 2010).

violation of a statute, the state engages an adversarial process seeking “truth” and an appropriate punishment. The proceeding limits participation to those proximate to the event and the experts necessary to conform to meticulous procedures intended to guarantee a fair process. This restricted construction of harm excludes wrongdoers and victims when the state does not prosecute a crime.¹⁰

*The next morning (the morning after) my husband reads an
editorial in the New York Times
by Lucinda Roy.
We feel like she has a deep perception.
The Amish survivors come to Blacksburg to share in sorrow
—bringing light.
We cry.*¹¹

The narrow focal point restricts the investigation to the facts around a specific violation of an identified statute. Contributing events occurring before and after the criminal act remain unexamined.

Restorative justice developed in response to this circumscribed vision of harm.¹² The roots of restorative justice spring from the

10. Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY, 671, 677, 693 (1999); see also Rosemary Gartner & Anthony Doob, *Trends in Criminal Victimization 1988–1993*, 14 JURISTAT 4 (1994) (containing statistics and analysis of criminal victimization between 1988–93 in Canada).

11. This editorial was my first acquaintance with Professor Lucinda Roy. Soon thereafter, I learned that she is a creative writing teacher at Virginia Tech. Eventually I learn that she had a long history with the events of April 16, which she describes in her book. See LUCINDA ROY, *NO RIGHT TO REMAIN SILENT: THE TRAGEDY AT VIRGINIA TECH* (2009).

Early that afternoon I had received a call from an editor at the *New York Times*. Would I write an op-ed about how the tragedy had affected the community? It would appear in the next morning’s paper. I agreed to do it. . . . I assumed I would be spending a large part of the rest of my career helping Virginia Tech, its students, staff, and faculty, come to terms with what had happened.

Id. at 23.

12. Initially, many critics of the retributive-based criminal judicial system in the United States asserted that it inadequately addressed the needs of criminal defendants, resulting in high recidivist rates and protracted, expensive legal proceedings. See, e.g., ZEHR, *supra* note 4, at 33–44; DAVID CAYLEY, *THE EXPANDING PRISON: THE CRISIS IN CRIME AND PUNISHMENT AND THE SEARCH FOR ALTERATIONS* 23 (1998) (describing how prisons fail to deter crime); JOHNSTONE, *supra* note 6, at 87–92. Victims grew frustrated by a bureaucratic judicial scheme that ignored victims’ experiences, needs, and desires. See, e.g., ZEHR, *supra* note 4, at 19–32;

experiences of harm by communities. It seeks to make right the wrongs through inclusive, collaborative processes. Restorative justice recognizes that criminal wrongdoing may violate statutes, but more appreciably, it harms relationships.¹³ Initial efforts to implement the values of restorative justice resulted in practices such as Victim Offender Mediation and Circle Sentencing.¹⁴ A formal charge lodged by the states initiates both of these processes. Few formal restorative justice processes established in the United States to address “criminal wrongdoing” operate independent of state prosecutions.¹⁵

MORTON BARD & DAWN SANGREY, *THE CRIME VICTIM’S BOOK* 104–06 (2d ed. 1986); SHELLEY NEIDERBACK, *INVISIBLE WOUNDS: CRIME VICTIMS SPEAK* 5–6, 9 (1986). Advocates for both victims and offenders began seeking alternate means to address crime and the harm that results from crime. *See, e.g.*, Mark S. Umbreit et al., *Restorative Justice in the Twenty-first Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 255 (2006).

13. ZEHR, *supra* note 4, at 21–24; *see also* Howard Zehr & Harry Mika, *Fundamental Concepts of Restorative Justice*, 1 CONTEMP. JUST. REV. 47, 52–55 (1998). Restorative justice advocates do not agree on the role of punishment following a crime. *See* Kathleen Daly, *Revisiting the Relationship Between Retributive and Restorative Justice*, in *RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE* 34 (Heather Strang & John Braithwaite eds., 2000) (arguing that restorative justice should embrace punishment). *But see* John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743–44 (1999) (arguing for a retributive sharing process rather than conventional punishment).

14. One of the first restorative justice programs emerged as the Victim Offender Conference (“VOC”) in Kitchener, Ontario in 1974. *See* Dean E. Peachy, *The Kitchener Experiment*, in *MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY* 14–16 (Martin Wright & Burt Galaway eds., 1989). This early program was identified as “VORP” or the Victim Offender Reconciliation Program. By the mid-1990s Victim-Offender mediation became accepted by communities in the United States. *See* Mark S. Umbreit, *Mediation of Victim Offender Conflict*, 1988 J. DISP. RESOL. 85, 85–87. Today the victim offender conference is recognized as the oldest, most widely practiced and thoroughly researched procedure considered as restorative justice. *See* Umbreit et al., *supra* note 12, 255–56; *see also* Mark S. Umbreit, *Avoiding the Marginalization and “McDonalization” of Victim-Offender Mediation: A Case Study in Moving Toward the Mainstream*, in *RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME* 213, 214 (Gordon Bazemore & Lode Walgrave eds., 1999). This early process identifies the victim and offender as the stakeholders by involving both from the beginning. *See* ZEHR, *supra* note 4, at 158–62. Subsequently, another process emerged in the Yukon Territorial Court that involves using a circle process in sentencing a defendant. *See* Kevin Libin, *Sentencing Circles for Aboriginals: Good Justice?*, NAT’L POST, Feb. 27, 2009, <http://www.nationalpost.com/news/story.html?id=1337495>; CAYLEY, *supra* note 12, at 182–86; KAY PRANIS ET AL., *PEACEMAKING CIRCLES: FROM CRIME TO COMMUNITY* (2003); KAY PRANIS, *THE LITTLE BOOK OF CIRCLE PROCESSES* (2005). Circle sentencing typically involves the “stakeholders” and includes victims, offenders, and members of the offender’s community.

15. *See, e.g.*, Barton Poulson, *Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167. Nearly all programs

Institutional links restrict restorative practices within the formal judicial processes, and implicitly incorporate doctrines that identify both the harm and the participants.

Are conventional processes now embedded within restorative justice practices? Do restorative practices operate within the definition of harm created by statutes or experiences? Does this emphasis on “court” cases abandon those harmed by wrongdoing, when the state does not prosecute the crime? Has restorative justice concentrated on the harmful aspects of our existing judicial design without examining the harmful aspects of the societal response to wrongdoing?

Today's the convocation as they call it.

*Dash calls—
seated in 1 seat of 10,052.*

*On my computer screen, I watch the students file in,
wearing their Virginia Tech shirts*

*—wearing the pained, empty expression that we all wore on
September 12, 2001.*

Nikki Giovanni speaks.¹⁶

Poet and Virginia Tech professor, Nikki Giovanni:

We are Virginia Tech.

We are sad today

We will be sad for quite a while

We are not moving on

We are embracing our mourning

We are Virginia Tech

examined in this Article involved cases either being prosecuted or referred by the court. *See also* Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, 1 W. CRIMINOLOGY REV. 1 (1998) (noting that the majority of programs in the United States serve as a diversion from the juvenile justice system primarily for first or second time offenders and most offenders receive referrals from the local probation department).

16. Later, I will learn that Professor Giovanni speaks not only as a poet and as a Hokie, but as someone who had alerted Virginia Tech authorities as early as 2005 about her concerns regarding Cho's demeanor and writing. *See* ROY, *supra* note 11, at 64.

We are strong enough to stand tearlessly
We are brave enough to bend to cry
And sad enough to know we must laugh again

We are Virginia Tech

We do not understand this tragedy
We know we did nothing to deserve it

But neither does the child in Africa
Dying of AIDS

Neither do the Invisible Children
Walking the night away
To avoid being kidnapped by a rogue army
Neither does the baby elephant watching his community
Be devastated for ivory
Neither does the Mexican child looking
For fresh water

Neither does the Iraqi teenager dodging bombs
Neither does the Appalachian infant killed
By a boulder
Dislodged
Because the land was destabilized

No one deserves a tragedy

We are Virginia Tech
The Hokie Nation embraces
Our own
And reaches out
With open heart and mind
To those who offer their hearts and hands

We are strong
And brave
And innocent
And unafraid

We are better than we think
And not yet what we want to be

We are alive to imagination
 And open to possibility
 We will continue
 To invent the future

 Through our blood and tears
 Through all this sadness

 We are the Hokies

 We will prevail
 We will prevail
 We will prevail

 We are
 Virginia Tech¹⁷

Students holler: "Let's go!"
Another group: "Hokies!"
A greeting. Regards—
*Soothing.*¹⁸

Do we need to invent a framework to return to a question of harm and away from questions of fault, fact finding and state involvement? Where do we look to find a way to reinvent, to broaden the inspection of harm?

17. NIKKI GIOVANNI, *We Are Virginia Tech*, in *BICYCLES: LOVE POEMS 107–09* (2009).

18. See ROY, *supra* note 11, at 129. Professor Roy notes: "When the students erupted into a Hokie cheer at the end of memorial services, it was a way for them to proclaim their unity and their loyalty to the institution." *Id.* While many were moved by Professor Giovanni's poem and the students' response, others reacted differently. See Patricia Mooney Nickel, *There Is an Unknown on Campus: From Normative to Performative Violence in Academia*, in *THERE IS A GUNMAN ON CAMPUS: TRAGEDY AND TERROR AT VIRGINIA TECH*, *supra* note 7, at 159, 160 ("My first observation is that the strident chorus of 'we are Hokies, we will prevail' was a pressurized ontological fiction that obfuscated the realization that something had changed."); see also Liza Mundy, *What Comes After*, WASH. POST, Nov. 11, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/11/06/AR2007110602460_pf.html. Holly Adams, the mother of Leslie Sherman, a student killed on April 16, was distressed by the reaction:

Somehow, the ceremony was turning into a pep rally, an expression of support for the school rather than of grief for those who died. "For crying out loud, who put her on?" she asked Tony, who tried to calm her. Holly still feels this way: "My daughter's dead, and you are goddamned Hokies!"

Id.

Both the institutional and community-based responses to the shooting supply measures for addressing harm. While the panel considered the responsibility of the state and the university contributing to the harm, their primary attention remained on Cho and April 16.¹⁹ The remedial plan elaborated on improved security measures.²⁰ In an e-mail sent to students on August 15, 2007, the “improvements” identified included new classroom locks “designed so occupants can lock the door from inside,” new building door hardware that cannot be chained, instructional posters on how to respond to emergencies, and the creation of VT Alerts, a system that allows notification about emergencies on a mobile device.²¹ Professor Roy observes: “As far as I can tell, apart from the development of some guidelines about how to evaluate and refer troubled students, Cho’s history at Virginia Tech has been erased from the upper administration’s collective memory.”²²

Restricting victims and offenders to circumscribed rights that stem from one isolated event restricts the potential for restoration. The morning of April 16 fell within a long series of events.²³ Any examination concentrating on the omissions of duty during the shootings necessarily confines itself to the shootings and neglects the structural infirmities that contributed to April 16. The narrow viewpoint obscures the colossal scope of the tragedy, including the

19. For example, one father testified before the panel about the repeated problems of student disciplinary procedures. His daughter had been stalked by an unidentified student, who remained on campus without any institutional sanctions. Lauren K. O’Neil, *Review Panel Meets; Learns of Letters Sent By Cho*, COLLEGIATE TIMES, July 17, 2007, <http://www.collegiatetimes.com/stories/9177/review-panel-meets-learns-of-letter-sent-by-cho>.

20. For a discussion as to the implication of focusing remedial actions on personal security measures, see Timothy W. Luke, *April 16, 2007 at Virginia Tech—To: Multiple Recipients: “A Gunman Is Loose on Campus . . . ,”* in THERE IS A GUNMAN ON CAMPUS: TRAGEDY AND TERROR AT VIRGINIA TECH, *supra* note 7, at 26, 27.

21. Email from James A. Hyatt, Exec. Vice President & Chief Operating Officer, Va. Tech Univ., to Multiple Recipients (Aug. 15, 2007) (on file with author).

22. ROY, *supra* note 11, at 68.

23. MASS SHOOTINGS AT VIRGINIA TECH: REPORT OF THE REVIEW PANEL (2007), available at <http://www.vtreviewpanel.org/report/index.html> [hereinafter PANEL REPORT]. The report begins the “Time Line of Events” in 1984 with Seung-Hui Cho’s birth to a family living in a small apartment in South Korea. *Id.* at 21. It concludes on April 20, 2007, when Governor Kaine declared a state-wide day of mourning. *Id.* at 30. The bulk of the time line addresses the months before the shootings and the day of the shootings. *Id.* at 24–27.

aftermath. Joseph Samaha, Jr., the father of student Reema Samaha, said, "It's hard to fathom the enormity of it all."²⁴

Perhaps our formal institutions have no capacity to imagine the enormity of it all. However, Virginia Tech professors Lucinda Roy and Timothy Luke have authored books that begin to imagine that enormity, creating an examination that far exceeds the time and cultural bounds of April 16.²⁵ Timothy Luke collaborated with Ben Agger to assemble sixteen different essays, including several by members of the Virginia Tech community, examining "how the sociological imagination can work."²⁶ Professor Luke and Professor Agger agree that the trouble started before Cho entered the university and suggest that the "troubles" are not over.²⁷ Similarly, Professor Roy noted the importance of expanding the investigation, observing that "this story is not simply one of heroism, endurance, and sympathy. It is more complicated and more human than that. It is about what preceded and what followed the tragedy as much as it is about the tragedy itself."²⁸

Poet and Virginia Tech professor Bob Hicok:

. . . Maybe sorry's the only sound
to offer pointlessly and at random
to each other forever, not because of what it means
but because it means we're trying to mean,
I am trying to mean more than I did
when I started writing this poem, too soon
people will say, so what. This is what I do.

24. Bill McKelway, *An "Irrefutable" Need*, VIRGINIA TECH: REFLECTION & RENEWAL (July 19, 2007), <http://originmedia.mgnetwork.com/imd/VTShooting/article125.htm>.

25. *See supra* notes 7, 11 and accompanying text.

26. Agger & Luke, *supra* note 7, at ix.

27. *Id.*

28. ROY, *supra* note 11, at 3. Professor Roy reminds us that:

It is vital when we look at a tragedy like this that we rid ourselves of assumptions and biases before we try to come up with solutions. We need to ask what actually happened. What do we know about Cho and about the culture at Virginia Tech? What do other school shootings teach us about students. . . . We need to be open to the idea that contradiction may lie at the heart of this issue, and that any solutions which do not take this into account will fail.

If I don't do this I have no face and if I do this
 I have an apple for a face or something vital
 almost going forward is the direction I am headed.
 Come with me from being over here to being over there,
 from this second to that second. What countries
 they are, the seconds, what rooms of people
 being alive in them and then dead in them.
 The clocks of flowers rise, it's April
 and yellow and these seconds are an autopsy
 of this word,

suddenly.

—Bob Hicok²⁹

II. WHEN THE OFFENSE IS NARROWLY DESCRIBED, THE NATURE AND ROLES OF THE PARTICIPANTS RECEDE

The assumption that harm involves discrete, identifiable moments in time defines the relationships of participants by their connection to the event. The power to allocate participation rests with those who name the event, those who charge the offender, and those who identify the victim. In modern criminal proceedings in the United States, the elected prosecutor determines the charge through a complaint or presentation before a grand jury. Charges are based on violations of statutes, passed by legislative bodies, setting forth prohibited behaviors in objective terms.³⁰ This adversarial process

29. BOB HICOK, *So I Know, in WORDS FOR EMPTY AND WORDS FOR FULL*, *supra* note 9, at 37–38.

30. “Objectivity” is another value that may be implicitly incorporated into many current restorative justice practices by initiating processes concurrent with the adversarial process. The objectivity is assumed to produce a “fair” adjudication of facts and equitable allocation of rights and duties by state controlled courts in contemporary western jurisprudence. This jurisprudence is rife with concepts considered to create or demonstrate objectivity. “[A] certain average of conduct, . . . is necessary to the general welfare.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 108 (2d ed. 1909). These objective standards include: the “reasonably prudent person,” MARC A. FRANKLIN, *GILBERT LAW SUMMARIES: TORTS* 54 (23d ed. 2002), JOSEPH W. GLANNON, *THE LAW OF TORTS: EXAMPLES & EXPLANATIONS* 69 (3d ed. 2005), *RESTATEMENT (SECOND) OF TORTS* §§ 288C, 296; “reasonable suspicion,” *Terry v. Ohio*, 392 U.S. 1, 37 (1968), *United States v. Knights*, 534 U.S. 112, 120–21 (2001); “implied intent,” *Garret v. Daily*, 279 P.2d 1091, 1093–94 (1955); and “probable cause . . . [which] exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.” *Ornelas v. United States*, 517 U.S.

assumes that conflicts involve two opposing parties: the State and the defendant. The state-run process provides each party with an “opportunity to be heard,” upon which neutral third persons determine a resolution.³¹

Historically, private parties also pursued criminal forms of redress. In the United States during the nineteenth century, public prosecution supplanted private prosecution in felony cases.³² By 1973, the United States Supreme Court ruled that a crime victim (as a private citizen) has no “judicially cognizable interest in the prosecution or nonprosecution of another.”³³ Scholar Douglas Beloff recognizes this critical change: “[T]he public prosecutor in the states meant the end of judicially cognizable victim interests in charging.”³⁴

Restorative justice practices tend to rely upon the same charging process, allowing the state to identify the harm through the selection of the charge and to name the victim and offender based on objective definitions contained within statutes. While restorative justice practitioners and theorists may apologize for the deficiencies of the

690, 696 (1996). The issue of whether or not neutral persons participate in conflict resolution in a better or lesser fashion than parties familiar with the conflict creates a further dilemma. See Norman Schultz, *Neutral Fact-Finding*, THE BEYOND INTRACTABILITY PROJECT (Nov. 2003), http://www.beyondintractability.org/essay/neutral_fact-finding (explaining that fact finding by neutral parties can be beneficial in certain situations); Edward A. Dauer, *Private Neutral Fact-Finding*, 1 MANUAL OF DISP. RESOL.: ADR L. & PRAC. 12–10, 21–11 (1994).

31. The adversarial system has come under questioning by critical legal theorists. See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996) (arguing that the adversarial system is inadequate for achieving the goals of the dispute resolution system).

32. See John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 515, 581 (1994) (describing the victim’s role in criminal prosecution in early American history); see also *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 127–28 (1998) (Stevens, J., concurring) (providing a summary of participation of citizens in criminal litigation); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE*, PHILADELPHIA, 1800–1880, at 5 (1989) (describing the history of private prosecution in the United States); William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 649–650 (1976) (arguing that in recent years, the victim’s role in the justice process has been drastically reduced).

33. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

34. Douglas E. Beloff, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 284 (2003) (citing Timothy P. O’Neill, *The Good, the Bad, and the Burger Court: Victims’ Rights and a New Model of Criminal Review*, 75 J. CRIM. L. & CRIMINOLOGY 363, 367–68 (1984)).

terms, “victim” and “offender” are part of the language that pervades the discourse of restorative justice.³⁵

After April 16, the Governor’s appointed panel was free to define the participants, not through a charge, but through identification of those in need. However, it failed to exercise that opportunity, elevating objectivity and expert knowledge over experience. When relatives of students met with Kaine to request inclusion, he promised to provide access, but claimed that including the victims in the panel, comprised of public safety, judicial, educational, and political figures, would compromise the panel’s objectivity.³⁶ Kaine excluded members of the Virginia Tech community from the panel and Virginia Tech President Steger further limited faculty and administrators’ access by requiring that all comments be channeled through a liaison.³⁷

35. See, e.g., Napoleon, *supra* note 5, at 37. Harry Mika also recognizes that “[r]estorative justice generally seeks to engage a monolith ‘victim’ that may not exist in the first place.” HARRY MIKA ET AL., TAKING VICTIMS AND THEIR ADVOCATES SERIOUSLY: A LISTENING PROJECT 12 (2002). The prescriptive power of this language is explored by Rupert Ross, who describes his experiences with a First Nations people when an Ojibway woman avoided terms like “accused” and the “offenders” since “[t]hose kinds of words, she said, had a tendency to stigmatize people, to ‘freeze’ them within a particular classification, making it more difficult for healing to occur.” See RUPERT ROSS, RETURNING TO THE TEACHINGS: EXPLORING ABORIGINAL JUSTICE 104 (2006); see also ZEHR, *supra* note 4, at 158–62 (noting that early victim offender processes identified the victim and offender as the stakeholders.) The term “offender” is used pervasively in restorative justice discussion, but usually without definition. See JOHNSTONE, *supra* note 6, at 13 (offering no definition of offender but stressing that they “are ‘one of us’, not enemies from outside”). Martin Wright includes a page of definitions in his text, but does not include definitions for victim or offender. MARTIN WRIGHT, JUSTICE FOR VICTIMS AND OFFENDERS: A RESTORATIVE RESPONSE TO CRIME, at iv (2d ed. 1996). Outside of restorative justice, I am most familiar with the term meaning someone who is convicted of violating a criminal statute. See, e.g., VA. CODE ANN. § 9.1-910 (2010)) (sex offender); 21 DEL. CODE ANN. § 2802 (2010) (habitual offender).

36. Tim Craig, *Families Pressure Kaine on V. Tech; Victims’ Relatives Won’t Be on Panel, Governor Says*, WASH. POST, June 24, 2007, at C01. However, it is confusing as to the role of conflict and the value of objectivity when the state conducted an investigation of itself and the state-controlled educational institution. Professor Roy notes that “[i]n this tricky situation—i.e., a state-controlled system of education was being investigated by the state that controlled it—potential conflicts of interest should have been apparent.” ROY, *supra* note 11, at 97.

37. ROY, *supra* note 11, at 97–93. Professor Roy described her limited contact with the panel. “In the summer of 2007, I wanted to speak openly with panelists about my experience with troubled students, and I hoped that an upcoming interview would provide an opportunity to do so.” *Id.* at 145. When Professor Roy spoke with the panelists Gordon Davies and Judge Diane Strickland, a discussion about access to records consumed most of the time. *Id.* at 146.

Those harmed by the tragedy experienced frustration from their exclusion. As the panelists met with authorities in a lengthy closed-door session preceding the release of the report, a spokesperson for several families commented that the report should “state that this tragedy was preventable and people who showed a lack of judgment must be held accountable Otherwise it’s a sham.”³⁸ Consistent with the principles and values of restorative justice, participation in a process should be broad and unrestricted by narrow definitions and objectivity.

Poet and Virginia Tech professor Bob Hicok (describing the “seventh day”):

. . . Students are full

of being full of grief, it’s coming out their feet
as they sprint after the Frisbee,
as they track down freedom and set it loose
again and again. Catch and release, the end and birth of joy
in the grab, stop, pirouette, flick of a kid
who watches the others dash off and turns
toward the memory of the shots, I see him
not knowing how to look in that direction
in his own way

—Bob Hicok³⁹

Insufficient and dangerous definitions channel our efforts of restoration in ways that obfuscate harm. Who are the victims? Some students know others in the classrooms, in the dorm. Some know Cho. Some have felt the terror of Cho’s threats years before the

Similarly, the President of Virginia Tech did not engage the community in distribution of the Hokie Fund, relying upon the appointment of a neutral, outside lawyer who had administrated other funds. *See infra* note 68 and accompanying text.

38. Carlos Santos & Rex Bowman, *Panel on Virginia Tech Killings Vows Open Discussion*, RICH. TIMES DISPATCH, July 20, 2007, http://www2.timesdispatch.com/news/2007/jul/20/-rtd_2007-ar-197634/.

39. BOB HICOK, *Terra Incognita*, in WORDS FOR EMPTY AND WORDS FOR FULL, *supra* note 9, at 45.

shootings, when Cho castigated them in class, telling them they will all burn in hell.⁴⁰

How wide is the pain, the harm, distributed among the parents, the alumni? Does the harm extend to those sitting at home, watching television, only to be stunned by the image of Cho aiming his gun at the camera lens? “Cho has already located his target—us. . . . The perspective is forced because the image compels the viewer to assume the role of victim.”⁴¹

How about Cho? Is he a victim? The Virginia Tech community constructed a memorial from “Hokie stones” in the days following the shootings, with one stone placed for each of the students and teachers killed. One student, Katelyn Johnson, added a thirty-third stone, because she believed that he too was victimized by his own illness.⁴² Are the family members of the shooter who were hundreds of miles away on the date of the shooting victims?⁴³ Do victims

40. In 2005, Professor Nikki Giovanni approached the chair of the English Department, Professor Lucinda Roy, since students felt unsafe in a class with Cho. On October 18, 2005 Professor Roy forwarded an email to university officials and to the Virginia Tech police department, which included a poem that Cho read out loud, castigating his class and telling them to burn in hell. ROY, *supra* note 11, at 31–33.

41. *Id.* at 213. Cho mailed a video and photographs to NBC in between the first and second set of shootings on April 16, 2007, which were widely disseminated on television, in newspapers, and in magazines. *Id.* at 87–88.

42. “At Virginia Tech, Seung-Hui Cho’s name was left off of memorials, and the Hokie stone meant to represent him was repeatedly removed from the impromptu mourning site. . . . I wanted to leave a flower on Seung-Hui Cho’s stone because I believe that he too, was victimized by his own illness.” *Id.* at 252; see also Tim Thornton, *Student Takes on Heavy Burden: Appropriateness of Cho’s Stone*, ROANOKE TIMES, Apr. 26, 2007, <http://www.roanoke.com/vtcampus/wb/114683>; Luke, *supra* note 20, at 21. “Hokie stone” is handcut limestone mined from a local quarry. Most of the buildings on campus are built of Hokie stone. See HOKIE STONE: VIRGINIA TECH’S STONE OF TRADITION, <http://www.vt.edu/about/2009-02-09-hokie-stone.pdf> (last visited Feb. 6, 2011).

43. For a very insightful demonstration of the ways that this “offender’s” family is a victim, see the statement issued three days after the shooting by Cho’s sister, Sun-Kyung Cho.

On behalf of our family, we are so deeply sorry for the devastation my brother has caused. . . . We grieve alongside the families, the Virginia Tech community, our State of Virginia, and the rest of the nation. . . . We are humbled by this darkness. We feel hopeless, helpless and lost. This is someone that I grew up with and loved. . . . Our family is so very sorry for my brother’s unspeakable actions. It is a terrible tragedy for all of us.

Cho Family Statement, CNN.COM (Apr. 20, 2007), http://articles.cnn.com/2007-04-02/us/shooting.family.statement_1_sun-kyung-cho-emily-jane-hilscher-unnanswered-questions?_s=PM i

include those who are thousands of miles away but share a common ancestry with the shooter?⁴⁴

How is power distributed when a judicial process identifies “victims” through a charging document, initiated by the state? When processes limit participation to classification, what happens to those who are excluded? What is the impact of any restorative justice practice that excludes unidentified victims?

*Time marches on.
On April 19 my daughter attends her art class at the
community college.*

*A woman, a mother, an artist, collapses.
Elexa rushes to her side and holds her head gently
As her eyes roll back into her head
And her tongue swells and she
Dies
(of a heart attack).*

*Elexa walks down the hall to tell the woman’s son (in math class)
as the paramedics roll the woman away.
“Your mother is dead.”*

US (last visited Feb. 8, 2011); *see also* ROY, *supra* note 11, at 29. Professor Roy describes Sun-Kyung’s suffering:

I think of Sun-Kyung and her family. Branded by Cho’s actions, they cannot simply grieve; they have to assume the burden he has willed to them. Unable to compete with his Princeton educated sister in life, Cho has triumphed over her in death. Sun-Kyung Cho will spend much of the rest of life apologizing for something she did not do . . . Her words are so full of anguish that they seem to tremble on the page. I cannot image how she will have the strength to carry her grief.

Id.

44. *See* Douglas Kellner, *Media Spectacle and the “Massacre at Virginia Tech,”* in *THERE IS A GUNMAN ON CAMPUS: TRAGEDY AND TERROR AT VIRGINIA TECH*, *supra* note 7, at 29. Addressing events from a cultural studies and critical social theory, Kellner claims that following the shooting frightened Korean students left campus and issued apologies. Furthermore, the president of South Korea made a formal apology. *Id.* at 35; *see also* Sandy Banks, *Ethnicity Brings an Unwelcome Focus*, *L.A. TIMES*, Apr. 19, 2007, at A01 (noting that some Korean Americans experience a sense of collective guilt as a result of the killings at Virginia Tech).

How do we look further? Can the “victims” be identified in a more expansive way? The global community has recognized this harm. By August 2007, Virginia Tech had received sixty thousand condolences. Those included thousands of origami cranes strung together. A U.S. Coast Guard unit sent a signed life preserver for the students. A prisoner at Lewisburg Federal Penitentiary in Pennsylvania sent cards with portraits of the victims that the prisoner drew, and a group of inmates signed the card. A group from Korea sent a large kite. A classroom of Chinese students sent a box of “special Chinese gifts hoping to bring you blessing, peace and finally joy in the midst and in the aftermath of the madness.”⁴⁵ By late summer 2007, the university received 40,742 cards, 2,331 banners, 1,266 posters, 408 textiles, and 23 books. Tamara Kennley, a Virginia Tech archivist who catalogued the items, understands the depth of these victims:

It just made me think a lot about grief and this whole ripple effect, that what happened here in the little town could have such a dramatic effect in the world that people would want to send something. . . . It’s affected them, too. It’s changed the way they see the world, too.⁴⁶

45. See Theresa Vargas, *Preserving the Outpouring of Grief: Va. Tech Archives 60,000 Condolences*, WASH. POST, Aug. 19, 2007, at A-1, A-12, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/18/AR2007081801200-pf.html>.

46. *Id.*; see also THE APRIL 16 ARCHIVE, <http://www.april16archive.org> (last visited Feb. 8, 2011). Karen MacKay, a master’s degree student at Virginia Tech in history who spent the summer of 2007 archiving the gifts shared her sentiments. “You can’t understand the magnitude of what has been sent unless you see it yourself. . . . It’s actually showing how much of a global community we’ve become.” Vargas, *supra* note 45; see also Brent K. Jesiek & Jeremy Hunsinger, *The April 16 Archive: Collecting and Preserving Memories of the Virginia Tech Tragedy*, in THERE IS A GUNMAN ON CAMPUS: TERROR AND TRAGEDY AT VIRGINIA TECH, *supra* note 7, at 185.

Memory preserved is the preservation of identity, and thus the preservation of shared sense-making and shared becoming. Memories provide trajectories and foundations for our futures. For countless thousands worldwide, the plurality of trajectories surrounding the events of April 16, 2007, at Virginia Tech was a break from the everyday, from normality. The shock of the tragedy required new ways of sense-making and negotiating common understandings.

Id. at 185–86.

The panel took a broad approach to defining “offenders,” expanding the investigation into omissions by the state and by the university. With respect to the state, the panel cited several deficiencies pertaining to mental health judges, monitoring and implementation of community based services, a lack of guidelines regarding court ordered treatments, and insufficient criteria for determining imminent danger to the community.⁴⁷

Beginning in 2005, Cho’s emotional condition came to the attention of state agents.⁴⁸ On December 13, 2005, Cho’s roommate

47. States typically allow for the civil commitment of persons who are found to pose a harm to themselves or others. VA. CODE ANN. §§ 37.2-817B–37.2-817C (2009). The standard in Virginia to authorize the involuntary commitment of a person changed following the shootings. Prior to 2008, the statute emphasized “imminent danger” to self or others and was replaced by a standard requiring “a substantial likelihood that, in the near future, he or she will cause serious physical harm to himself or herself or another person” or “will suffer serious harm due to substantial deterioration of his or her capacity to protect himself or herself from such harm or to provide for his or her basic needs.” VA. CODE ANN. § 37.2-817C (2009). For a discussion of standards for commitment, see Alison Pfeffer, Note, “*Imminent Danger*” and *Inconsistency: The Need for National Reform of the “Imminent Danger” Standard for Involuntary Civil Commitment in the Wake of the Virginia Tech Tragedy*, 30 CARDOZO L. REV. 277 (2009). State statutes that permit the civil commitment of mentally ill persons follow from the role of the state as *parens patriae* to protect the person, as well as from the “police power” of the state creating an obligation for the state to protect the community from harm. *Id.* at 282. Generally, when a judge finds that the risk may be minimized or eliminated through a less restrictive alternative to physical confinement, the person is released contingent upon the receipt of services. VA. CODE ANN. § 37.1-817(B) (2009). There is no consensus that the legislative changes are sufficient or beneficial. One physician voiced concern that the new standard does not require that the determination be made by a physician but may be made by an employee of a local community services board. Lawmakers also allocated \$42 million for two years for case management and services. Aaron Levin, *Virginia’s Commitment Law Raises Many Questions*, PSYCHIATRIC NEWS, Apr. 4, 2008, <http://pn.psychiatryonline.org/content/43/7/21.full>. However, there is no consensus that this is sufficient to address the crisis that predated the shootings. The malfeasance of the state to both create a functional mental health care system as well as the neglect upon learning the threat posed by Cho undeniably created the environment that made this tragedy possible. Chris L. Jenkins, *Va. Reviews Mental Health Reforms: Agencies Look at System Overhaul After Va. Tech Shootings*, WASH. POST, June 17, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/16/AR2007061600953.html>; see also Luke, *supra* note 20, at 25 (“There is an emerging consensus about the need to replenish funds for the overstretched mental health system in the state, but no one has made any solid guarantees that it will be enough to repair decades of neglect.”).

48. The details regarding the facts surrounding Cho’s mental health care were made available when Cho’s father waived his son’s right to privacy of the mental health records to permit the panel to fully investigate both Cho’s mental condition and the response of the state when formally placed on notice of the condition. Michael Sluss, *Cho’s Family Releases Records*, ROANOKE TIMES, June 15, 2007, <http://www.roanoke.com/vtinvestigation/wb/120753>;

reported Cho's suicidal behaviors to authorities.⁴⁹ Campus police examined Cho's emails and placed him in custody. He was examined, held overnight and released with instructions to receive therapy. He never received any treatment.⁵⁰ The Review Panel concluded that the flawed Virginia mental health system inadequately addressed involuntary commitment and did not provide for supervision of court-ordered outpatient care.⁵¹

A second infirmity in the state's reaction prior to the shootings involved the failure of the state, with knowledge of Cho's mental condition, to preclude his access to automatic weapons. After the intervention by the state, Cho purchased two guns, one across the street from campus and the other online.⁵²

The recommendations of the panel prompted several statutory and policy changes. The standard for commitment of mentally ill persons was revised,⁵³ and Governor Kaine signed an executive order intended to close the "loopholes" that allowed Cho to purchase the

see also Marti Covington, *Kaine Gets Questions from Tech Families*, RICHMOND TIMES-DISPATCH, July 29, 2007, at A1.

49. PANEL REPORT, *supra* note 23, at 23.

50. A "pre-screener" at New River Valley Community Services examined Cho and found him to be an "imminent danger," authorizing medical personnel to hold him overnight at a psychiatric hospital. The following day a staff psychiatrist examined him for about fifteen minutes. ROY, *supra* note 11, at 64-65; PANEL REPORT, *supra* note 23, at 23. The commissioner ordered that he receive outpatient treatment, which no one provided or monitored. *See id.* at 23; ROY, *supra* note 11, at 65.

51. Tim Craig & Sandhya Somashekhar, *The Toll Would Have Been Less': Panel Details Problems That Could Take Years to Fix*, WASH. POST, Aug. 30, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/30/AR2007083000908.html>. Psychiatrist and panel member Dr. Aradhana Bela Sood described Cho's care at the Cook Counseling Center as "minimal" after he was declared a danger by the commissioner. He was ordered to attend therapy sessions. McKelway, *supra* note 24. Since the time that Dr. Sood made this comment, records that were removed by director Robert Miller from Cook Counseling Center have been located at his home. Sluss & Moxley, *supra* note 3. Cho did call and keep at least one appointment. ROY, *supra* note 11, at 63. Parent Lori Haas, whose daughter was wounded, holds gaps in the mental health laws and outpatient treatment responsible for the tragedy. McKelway, *supra* note 24.

52. ROY, *supra* note 11, at 224.

53. For a discussion of some of the reforms, see Richard J Bonnie et al., *Mental Health System Transformation After the Virginia Tech Tragedy*, 28 HEALTH AFF. 793 (2009), available at <http://www.law.virginia.edu/pdf/mh%20system%20transformartion%20health%20affairs%205-09.pdf>.

guns.⁵⁴ The new laws require the state to enter the names of persons ordered to receive a mental health evaluation into a database, to prohibit them from making gun purchases.⁵⁵ The federal government enacted legislation providing modifications to gun control laws related to mental health services.⁵⁶

The legislative response may be ineffective. Critics have suggested that the remedial steps to improve the mental health system have been inadequate.⁵⁷ In the 2008 Virginia legislative session, the gun control package introduced at the request of some of Cho's victims failed to pass out of the Senate's Courts of Justice Committee.⁵⁸ Since 2008, both the state and federal schemes have permitted broader private distribution of guns than during the time preceding the 2007 shootings.⁵⁹

54. Michael Sluss, *Governor Closes Gun Purchase Loophole*, ROANOKE TIMES (Apr. 30, 2007, 12:40 PM), <http://www.roanoke.com/news/nrv/breaking/wb/113294>. Some argue that a primary problem with gun distribution that caused the shootings is the confusion as to the application of federal over state laws. See Michael Luo, *Cho's Mental Illness Should Have Blocked Gun Sale*, N.Y. TIMES, Apr. 20, 2007, <http://www.nytimes.com/2007/04/20/us/20cnd.guns.html>; see also Sohrab Zahedi et al., *Gun Laws and the Involuntarily Committed: A California Road Map*, 37 J. AM. ACAD. PSYCHIATRY & L. 545, 547 (2009). Others blame the difficulty posed by placing mental health professionals in conflicting situations. Joseph R. Simpson, *Bad Risk? An Overview of Laws Prohibiting Possession of Firearms by Individuals with a History of Treatment for Mental Illness*, 35 J. AM. ACAD. PSYCHIATRY & L. 330, 336–37 (2007).

55. *Close Up Loopholes, Father Tells Panel*, DAILY NEWS RECORD, June 19, 2007, at A-1.

56. Thomas Ferraro, *Senate Passes Gun Bill in Response to Rampage*, REUTERS, Dec. 19, 2007, <http://www.reuters.com/article/topNews/idUSN1962838820071220?feedType=RSS&feedNam=topNews>.

57. See *supra* note 47 and accompanying text.

58. Candace Sipos, *Virginia Scores Low on Gun Control*, COLLEGIATE TIMES, Feb. 6, 2008, available at <http://www.collegiatetimes.com/stories/10525/virginia-scores-low-on-gun-control>. One of the measures that did not pass during the 2008 session included distribution of guns without background checks at gun shows. *Id.* Professor Roy explains “[t]hat was in late January 2008, and by then, images of the Tech slaughter were already fading fast.” ROY, *supra* note 11, at 222–24.

59. See generally Ian Urbina, *Fearing Obama Agenda, States Push to Loosen Gun Laws*, N.Y. TIMES, Feb. 23, 2010, <http://www.nytimes.com/2010/02/24/us/24guns.htm> (explaining, for example, that Virginia repealed a ban on buying two or more handguns in a month three years after the massacre). The NRA has expressed satisfaction at the recent legislative changes. See *Virginia General Assembly Overrides Veto of Two Pro-Gun Bills!*, NAT'L RIFLE ASS'N INST. FOR LEGIS. ACTION (Apr. 8, 2009), <http://www.nra.org/legislation/read.aspx?id=4732> (expressing regret that the Senate failed to override the Governor's veto of a law that would have permitted retired law enforcement officers to carry guns into bars, and applauding the Senate's override of a veto of a bill that allows training for use of certain guns to be

The panel also investigated the shortcomings of Virginia Tech's institutional response to the threats appearing in the years prior to the tragedy. The panel cites Virginia Tech's failure to provide mental health and support services to all students, especially to troubled students.⁶⁰ Despite specific referrals to mental health services, the institution failed to meet Cho's identified special needs.⁶¹ The disciplinary process employed by Virginia Tech also neglected Cho's special needs. The process concentrates heavily on prohibitions involving drug and alcohol use and employs a system of punishment and sanctions over therapeutic measures.⁶²

accomplished online); *Virginia: Pro-Gun Legislation Heading to Governor McDonnell!*, NAT'L RIFLE ASS'N INST. FOR LEGIS. ACTION (Mar. 10, 2010), <http://www.nraila.org/Legislation/Read.aspx?id=5555&issue=> (celebrating the passage of bills restricting the ability of a county to establish certain reporting requirements with the circuit court, allowing carrying concealed weapons in vehicles, permits carrying firearms into bars, and expanding authority of circuit court judges).

60. From 2003–2007, following the retirement of Barbara Pendergrass, the Office of the Dean of Students was abolished. This office was reestablished after the shootings and is a key component of the care team charged with the care for troubled students. See ROY, *supra* note 11, at 130–31. Furthermore, Dr. Miriam Shuchman, an assistant professor in psychology at the University of Buffalo, found that Virginia Tech's policies made it difficult to identify or assist mentally troubled students and that insufficient services are available to students. Miriam Shuchman, *Falling through the Cracks—Virginia Tech and the Restructuring of College Mental Health Services*, 357 NEW ENGLAND J. MED. 105, 105–07 (2007).

61. These structural infirmities did not extend the support Cho needed and sought. Professor Lucinda Roy contacted the Cook Counseling Center as early as October 2005. ROY, *supra* note 11, at 32–33. Cho called Cook Counseling Center in November 2005, after an interaction with the Virginia Tech police. He had a 2 p.m. appointment on December 12, 2005, and another on December 14, 2005. *Id.* at 63; PANEL REPORT, *supra* note 23, at 23. Dr. Roy reports that “[t]he system failed to provide needed support and services to Cho during a period in late 2005 and early 2006. The system failed for lack of resources, incorrect interpretation of privacy laws, and passivity. Records of Cho's minimal treatment at Virginia Tech's Cook Counseling Center are missing.” ROY, *supra* note 11, at 63. The records have since been located. *Id.*

62. The Office of Student Conduct, formerly the Office of Judicial Affairs, is charged with responding to a violation of the University Policies for Student Life by a student. A referral may be made by anyone and is delivered to the Office of Student Conduct, which then assigns charges and sets a hearing. See *Making a Referral: Student Conduct*, VA. TECH DIV. STUDENT AFF., <http://www.studentconduct.vt.edu/makereferral.php> (last visited Feb. 6, 2011). The name of the division charged with student discipline changed in 2009 from “Judicial Affairs” to “Office of Student Conduct.” See Phillip Murillas, *Getting Into Trouble: Rights and Responsibilities*, COLLEGIATE TIMES, June 21, 2009, <http://www.collegiatetimes.com/stories/13861/getting-into-trouble-rights-and-responsibilities>. The student code of conduct prohibits abusive conduct, actions that constitute a criminal offense, violations of the alcoholic beverage policy, illegal possession of drugs, hazing, and other offenses. *Hokie Handbook: Student Code of Conduct*, VA. TECH DIV. STUDENT AFF., <http://www.hokiehandbook.vt.edu/codeofconduct/>

The panel findings conclude that during Cho's "junior year at Virginia Tech, numerous incidents occurred that were clear warnings of mental instability. . . . Although various individuals and departments within the university knew about each of these incidents, the university did not intervene effectively."⁶³ The panel report details Cho's threatening behavior, resulting in his removal from class and placement in private tutoring.⁶⁴ The Panel cited other contributing failures by the institution, including insufficient admission processes,⁶⁵ a failure by the institution to properly educate

(last visited June 2, 2010). The full range of offenses include conduct ranging from sexual harassment, destruction of property to having unregistered motor vehicles, illegal weapons, and alcohol abuse. Few efforts address underlying problems with treatments and services; rather the code focuses on "sanctions" that typically involve warnings, suspension, or expulsion from the school. The penalties for the violations of these infractions range from a formal warning (some cases of sexual harassment) to suspension (illegal drug use). *Student Conduct: Plain English Policies*, VA. TECH DIV. STUDENT AFF., <http://www.studentconduct.vt.edu/english.php> (last visited June 2, 2010). The over-reliance on sanctions and "education" have not been effective at most campuses. See, e.g., Jennifer Epstein, *Students Aren't the Only Boozers*, INSIDE HIGHER EDUC., June 4, 2010, <http://www.insidehighered.com/news/2010/06/04/acha>.

63. PANEL REPORT, *supra* note 23, at 2.

64. *Id.* at 43–44. Dean Tom Brown agreed that the policy on disruptive actions prohibited Cho's behaviors, and he discussed the matter with a counselor at Cook Counseling Center and with Frances Keene with Judicial Affairs, who did not pursue a judicial referral. Several unidentified complainants reported Cho's stalking and odd behaviors to Judicial Affairs, which never issued a charge or scheduled a hearing. The Panel Report does not disclose whether or not other potential reporters, such as Virginia Tech Police Department filed complaints. *Id.* at 43–46. The office concerns itself with minor alcohol infractions as to address nearly one thousand minor violations and one hundred major violations in most years. Gordon Block, *Alcohol Violations Take Unexplained Dive*, COLLEGIATE TIMES, Sept. 10, 2009. Minor violations are those that involve simple underage possession or consumption and those violations numbered 971 in 2005–2006, 1068 in 2006–2007, 1030 in 2007–2008, and 418 in 2008–2009. Major violations are those that involve threats to health, and may require medical transportation and they totaled 100 in 2007–2008 and 121 in 2008–2009. *Id.* See also ROY, *supra* note 11, at 144.

65. PANEL REPORT, *supra* note 23, at 146. The admissions processes do not identify students who may not be suited for Virginia Tech or students who need additional services in order to succeed in the environment. Virginia Tech has a total of over 30,000 students who attend classes on a 2,600 acre campus with over 125 buildings. See *About Virginia Tech*, VIRGINIA TECH, <http://www.vt.edu/about> (last visited Feb. 6, 2011). "Reports surfaced in the media and it was confirmed in the Panel Report that Cho had been advised by his family and his high school counselor not to attend Virginia Tech. They all felt it was too large and impersonal a school for someone like him." ROY, *supra* note 11, at 64. After the initial concerns were raised by Roy to the administration, and she provided the private tutoring, "Sueng-Hui Cho returned to his classes the next semester without medication, without counseling, without any support system whatsoever." See *id.* at 65; see also Luke, *supra* note 20, at 24 ("Cho may have been deeply disturbed when he arrived at Virginia Tech, but his painful isolation never eased while he was in residence on the campus."). Cho reportedly received mental health services

deans and administrators about privacy laws,⁶⁶ and a lack of security measures and notification processes.⁶⁷

*This is the day of the moment of silence.
I sit outside today, for that minute—
moment—
of silence.*

*In the sun (warmth)
the church bells ring more times (probably thirty-two).*

prior to his admission, but no one notified the university during the admissions process of his diagnosis of selective mutism, or of his treatments. ROY, *supra* note 11, at 36; *see also* PANEL REPORT, *supra* note 23, at 38. The University president remarked, “We did not have any of that information. . . . The information that we seek for admissions, other than did you get your measles shot or whatever, is the academic record.” *Tech Killer Reportedly Treated in High School*, RICH. TIMES-DISPATCH, Aug. 28, 2007, http://www2.timesdispatch.com/news/2007/aug/28/-rtd_2007_08_28_0147-ar-1854371/. Admission practices employed by other universities, such as essays and in-person interviews, may have provided critical information to the university community. While college admission processes vary, many encourage interviews. *See, e.g., Frequently Asked Questions: Applying to Yale College*, YALE C. OFF. OF UNDERGRADUATE ADMISSIONS, <http://admissions.yale.edu/faq/applying-yale-college> (last visited Feb. 13, 2011); Barbara Rodriguez, *More Colleges Expected to Offer Online Interviews*, WASH. POST, Jan. 2, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009>. Essays are considered a critical part of many applications. *See* Jazmine Ulloa, *Essays Play a Crucial Role in College Admission Process*, BROWNSVILLE HERALD, Oct. 20, 2009, <http://www.brownsvilleherald.com/articles/process-103948-admission-role.html>; *see also Writing the Essay: Sound Advice from an Expert*, OFF. UNDERGRADUATE ADMISSION: U. VA., <http://www.virginia.edu/undergradadmission/writingtheessay.html> (last visited Feb. 6, 2011); *Essays that Worked!*, CONN. C., <http://www.conncoll.edu/admission/essays.htm> (last visited Feb. 6, 2011).

66. PANEL REPORT, *supra* note 23, at 2. The Panel assessed additional fault in the university’s response to Cho’s behaviors in their misunderstanding of privacy laws. The Panel concluded: “Although some of his professors discussed his problems, Virginia Tech officials did not communicate among themselves because of their perception of state and federal privacy laws. The panel concluded that the officials interpreted the laws to be more restrictive than they are.” Craig & Somashekhar, *supra* note 51; *see* Shuchman, *supra* note 60.

67. The Panel concluded: “It might be argued that the total toll would have been less if the university had canceled classes and announced it was closed for business immediately after the first shooting” PANEL REPORT, *supra* note 23, at 84; *see also* Craig & Somashekhar, *supra* note 51; Zach Crizer, *Report Says Tech Did Not Provide ‘Timely Warning’*, COLLEGIATE TIMES, May 26, 2010, <http://www.collegiatetimes.com/stories/15508/report-says-tech-did-not-provide-timely-warning>. While the lack of security measures such as notification procedures, door locks, and security personnel created risks, the more substantial security risks are created by the lack of provision of services. For a discussion of a broader understanding of security in the context of international conflict, *see What Is 3D Security, Conflict Prevention & Peacebuilding?*, 3D SECURITY INITIATIVE, <http://www.3dsecurity.org/learn> (last visited Feb. 13, 2011).

*After they stop I feel a slight, warm breeze
Faster . . . and then it stops.
I close my eyes—an odd heat
orange
red
burns in my field of vision.
Hoping for a heat that can thaw a horrible wind too powerful
to harness.*

*I go inside and turn the computer on . . . a new day . . . new
people . . . new place . . . at cnn.com a new story—“Local
Houston CNN affiliate stations now report the gunman and
one other person are dead.”*

Both the panel and the distribution of the “Hokie Fund” relied upon “experts” to the exclusion of persons closest to the harm.⁶⁸ Conventional judicial processes also rely upon “experts,” both to direct procedures, such as judges and lawyers, and to provide information necessary for “fact finding” through “expert witnesses.” Conventional processes expand beyond victims, offenders, and the experts by including the community through the participation of jurors and witnesses. If restorative justice narrows the scope of participation to “victims and offenders” or “stakeholders,” are critical persons excluded? Does restorative justice unnecessarily grant participation to experts over the extended community?⁶⁹ Erbe

68. Offices deferred to “experts” in implementation of both the “Hokie Fund” and the Panel. For example, Virginia Tech president C. Steger selected New York lawyer, Kenneth Feinberg to administer the disbursement of the fund, claiming that “we are not in a position to pre-suppose what is best for victims or their families. . . . With no experience in dealing with crime victims, we felt it best to seek expert advice in disbursements of these monies.” Angela Manese-Lee, *A Willing Master of the Hokie Spirit Fund*, ROANOKE TIMES, Aug. 14, 2007, <http://www.roanoke.com/vtmemorials/wb/127893>.

69. How large is the potential pool of those who may want to participate? Those who have been affected by the harm and still have something to offer? For example, before the Virginia Tech football game against Miami in the fall of 2007, nine thousand people gathered to spell out “VT Thanks You” in the football field during the halftime of the home game. Gordon Block, *Community to Gather for ‘Hokies Thank the World.’*, COLLEGIATE TIMES, Nov. 16, 2007, <http://www.collegiatetimes.com/stories/10143/community-to-gather-for-hokies-thank-the-world>.

emphasized the importance of vesting control of the processes to the members of a community:

The real demon in the development of the modern restorative justice movement is bureaucratic structures and the organizational culture/thinking around it. This specifically relates to the belief that professionals are in a better position to make decisions for those who are directly impacted by social events in their own lives.⁷⁰

Is restorative potential consequently limited to those objectively “harmed”? Do those who were not intended to be harmed, but now suffer, disappear? Rupert Ross describes certain First Nations people’s processes which allow for inclusion of unidentified victims, since “each criminal act has an impact on a *wide* number of relationships, often in ways that may not be predictable.”⁷¹ If the harm is not addressed, the pain continues to spread “from one relationship to another in an ever-expanding ring of disharmonies, touching, ultimately, many hundreds of people.”⁷²

(Preface: I knew they’d drink a lot more.)

Every morning I check the news.

New York Times. Check.

Washington Post. Check.

Collegiate Times. Check Stop. Wait.

*Headline: (with numbers) 2:00 a.m., BAC .20, 8 pedestrians
hit.*

Headline: crashed into light pole, then she hit them.

(I knew they’d drink a lot more.)

Headline: junior communications major

70. Carsten Erbe, *What Is the Role of Professionals in Restorative Justice?*, in *CRITICAL ISSUES IN RESTORATIVE JUSTICE* 293, 294 (Howard Zehr & Barb Toews eds., 2004).

71. ROSS, *supra* note 35, at 179.

72. *Id.*

*Mary Ann.
Dashiell's classmate.
Tyler's girlfriend.
Honor student.
Festival queen.
Offender.
(I knew they'd drink a lot more.)
So much—to make her a felon? So much more. Her mom says
to me,*

“She is so much more.”

Outside of the formal panels, funds and the civil litigation, families, friends, and community members generated significant restorative processes. One group created VT Engage, a community service program, involving students and alumni who volunteer in memory of the losses sustained in the tragedy.⁷³ In the days following the shootings, Brent K. Jesiek, a postdoctoral research associate at Virginia Tech and manager of the university's Center for Digital Discourse and Culture created a digital memory bank to make “available a space for the public to share memories with one another in a time of need.”⁷⁴ Jesiek and his co-author, Jeremy Hunsinger, recognized that such a memory bank, rather than normalizing to a standard narrative, as would an archive, tends toward “inclusivity, which allows people to create multiple and differential relationships to a given archive . . . Contributors can feel the acceptance of their own significance.”⁷⁵ Poet and professor Fred D'Aguiar's mother visited her son after the shootings, and cooked a meal for his class.

73. *VT-ENGAGE to Honor Victims of April 16*, VA. TECH MAG., Fall 2007, <http://www.vt-magazine.vt.edu/fall07/news.html>. The memorials created have become an “exercise of healing” and have since been turned into an “intermediate official memorial.” Luke, *supra* note 20, at 21.

74. Jesiek & Hunsinger, *supra* note 46, at 195. The initial press release explained: “Through this archive, we aim to leave a positive legacy for the larger community and contribute to a collective process of healing, especially as those affected by this tragedy tell their stories in their own words.” *Id.* at 201. The memory bank is located at <http://www.aprill6archive.org>.

75. *Id.* at 193.

Poet and Virginia Tech professor Fred D'Aguiar:

My mum cooked soul food for my final class:
Fried plantains, cow-tail in a stew of casareep,
Boiled dumplings, sliced pineapple and mango
Juice, for our first meeting after the cancelled week.
One student arrived with a bouquet for my mother.
Everyone heaped *Pirates of the Caribbean* paper plates
For this breakfast, minus one of our number, gone
For good. We ate as if on the heels of a Ramadan
Squeezed into a week of nil by mouth, ears and eyes.
My mum flew to Blacksburg for our joint offer.
She rose before the birds and I helped to skin
Exotica and washed up to keep the kitchen clean.
At 9AM we breezed into my Caribbean class
And served up honeydew with plates of paradise.

—Fred D'Aguiar⁷⁶

Could a more inclusive formal process produce a more forward-looking, positive, and inclusive response? Will reliance upon all of those affected by the tragedy produce the “blessed illumination” that we crave?⁷⁷ Should restorative justice look to practices embedded in court procedures and in the Governor’s panel’s process, or to the healing efforts that emerged from within the community for inspiration? What do we learn from Brent Jesiek and Jeremy Hunslinger when they dedicate their chapter to “all who have been touched by the April 16 tragedy at Virginia Tech?”⁷⁸ Is it possible that harms, and healing, have no bounds?

One night, during a fitful sleep, I dreamed of a language that would be inclusive enough to allow for the participation in restorative

76. D'AGUIAR, *supra* note 8, at 70.

77. See *infra* text accompanying note 90 for a discussion of this term used by Professor Roy in describing her search after the tragedy.

78. Jesiek & Hunsinger, *supra* note 46, at 204.

processes by all of those affected. In my dream, they were the OWEHA (One Who's Experiencing (a) Harmful Act).

*Wintertime. Cold again. Still dark. Windy again. Branches
against the window. Rat tat tap. (The rat tap tap—
tapping out.)
(The rat tat tap.) In the car today (on the radio) Reema Joseph
Samaha's brother speaks. The Virginia Legislature killed his
gun show bill.
(The rat tat tap.) In class at eleven—chat about stakeholders.
(The rat tat tap.) Sleepless. Dreams that struggle.
Tomorrow morning scribbled on a legal pad an acronym—
OWEHA.
I look of the meaning of the word.
"May the spirit be with you."
"An island in South Wales"
"A song in Africa."*

A justice wherein those harmed identify themselves. In the play *Six Characters in Search of an Author*, six characters refuse to rehearse according to the script.⁷⁹ Pirandello explained that the characters, although creatures of his spirit, were “already living a life which was their own and not mine any more, a life which it was not in my power any more to deny them.”⁸⁰ Who has the power to deny a victim their experience?

In exploring the role of victims as participants in sentencing, Douglas Beloof recognizes that the self-limiting terms used for victims and proposes a new language that recognizes the participation rights of victims. He chooses the word, “participant,” which “has not previously been used as a term of art in criminal procedure, and therefore is readily adopted here as a new term meaning ‘crime victim with rights of intermittent participation in the criminal process.’”⁸¹ Inclusive terms: *participator*, *participant*, OWEHA.

79. LUIGI PIRANDELLO, *Preface to SIX CHARACTERS IN SEARCH OF AN AUTHOR* (1925), available at <http://www.ibiblio.org/eldritch/lp/sixp.htm>. Pirandello described his intentions: “I have already afflicted my readers with hundreds and hundreds of stories. Why should I afflict them now by narrating the sad entanglements of these six unfortunates?” *Id.*

80. *Id.*

81. Beloof, *supra* note 34, at 286.

III. WITH RESTRICTED DEFINITIONS OF THE HARM AND PARTICIPANTS, RIGHTS BECOME ALLOCATED BETWEEN STAKEHOLDERS

When restorative justice, like our criminal judicial process, isolates a singular act of wrongdoing and defines the participants in the process based on their relationship to the act, questions about rights follow. What rights do these opposing parties “enjoy”? What are the relative rights of each victim as to one another, each offender as to one another? Restorative justice theories or programs promote participation by all “stakeholders.” For example, Tony Marshall describes restorative justice as “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.”⁸² However, “stakeholders” implies a right to a parcel of property shared by competing interests in the property, who, by virtue of ownership, gain access to a process to resolve the dispute over the right to enjoy the property. The rights-based view of participation in criminal judicial processes contradicts values and principles of restorative justice by adopting universal principles based in objectivity, impartiality, and detachment.⁸³ Restorative justice demands incorporation of a needs-based response to harm, while concurrently respecting the human rights of participants. The response may respect certain universal rights, but must concurrently

82. See TONY F. MARSHALL, HOME OFFICE RES. DEV. & STAT. DIRECTORATE, RESTORATIVE JUSTICE: AN OVERVIEW 5 (1999), available at <http://www.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf>; see also Gordon Bazemore & Twila Hugley Earle, *Balance in the Response to Family Violence: Challenging Restorative Principles*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 153, 155–56 (Heather Strang & John Braithwaite eds., 2002) (discussing “maximizing stakeholder involvement in decision-making” and explaining that “stakeholder balance requires that we find appropriate balance between participation and active involvement of the victim, offender, their supporters and other community members”); Umbreit et al., *supra* note 12, at 258.

83. Christa Obold-Eshleman critiques the rights-based analysis used by victims’ groups to claim a position of entitlement within the criminal judicial process, suggesting that a more relational, less adversarial conception of rights would promote the dignity of all persons. See Christa Obold-Eshleman, Note, *Victims’ Rights and the Danger of Domestication of the Restorative Justice Paradigm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 571, 592–94 (2004); see also Paul McCold, *What Is the Role of Community in Restorative Justice Theory and Practice?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 156, 158 (Howard Zehr & Barb Toews eds., 2004).

respond to harm in connected deliberation. The question changes from “What is this person’s (or community’s) right?” to “What does this person (or community) need and how can those needs be fulfilled consistent with basic human rights?”⁸⁴

The exclusively rights-based evaluation of a response to harm that sets up the competing interests of the victim and offender also sets up competing rights within those classifications. When justice is envisioned as an object to be partitioned out, it becomes dispersed in accordance with an objective hierarchy. Many restorative justice theories, like the officials directing the community response after the shootings, place the extended community near the bottom of hierarchy. Col. W. Gerald Massengil, in discussing the investigation of the governor-appointed committee following the tragedy said, “We’re still looking for a way to involve the families in a higher level than the public.”⁸⁵ Similarly, restorative justice proponent Paul McCold devalues the effect of wrongdoing on the community. “Aside from those who may be part of a victim’s or offender’s micro-community, most macro-community members are likely to have little or no significant emotional connection to any specific crime.”⁸⁶

84. See generally Carol Gilligan, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982) (describing a needs-based ethic of care and constructing that ethic in response to a masculine-oriented ethic of rights). I am not suggesting that the needs-based analysis is always easily distinguishable from the rights-based analysis; such neat divisions rarely apply in any situation involving conflict. I am also not suggesting an “association of justice and care reasoning with male/masculine and female/feminine voices, respectively.” See Kathleen Daly, *Restorative Justice: The Real Story*, 4 PUNISHMENT & SOC’Y 55, 64 (2002), available at http://www.griffith.edu.au/_data/assets/pdf_file/0011/50321/kdpaper.pdf. Rather, I am suggesting that we not restrict our analysis to respective rights, but find a more holistic way to incorporate the needs articulated by all participants without neglecting the rights of the same participants.

85. Carlos Santos, *Tech Panel Not Sure When Findings Will Be Made Public*, RICH. TIMES-DISPATCH, July 25, 2007, http://www2.timesdispatch.com/special_section/2007/jul25/-rtd_2007_07-25_0152-ar-1955431.

86. See generally *supra* note 83 (recognizing the significance of the community but imposing objective criteria to define community and imposing a hierarchical response with a presumed schedule of needs). The hierarchy cited by the Virginia Tech administration and restorative justice theorists also reflects a low placement of the community. Referring to the special administrative assistant appointed to head the Office of Recovery and Support at Virginia Tech, President Charles Steger stated: “Jay’s top responsibility will be to address the needs of April 16 victim’s families, injured students, or those closely connected to the event.” Allyson Folker, *University Creates Office of Recovery and Support*, COLLEGIATE TIMES, Aug. 2, 2007, <http://www.collegiatetimes.com/print.php?a=9211>. “Restorative justice practice must focus most attention on involving and meeting the needs of victims first and communities

Restorative justice need not be bound to the underpinnings that limit justice within our conventional processes. While the institutional extra-judicial responses to the tragedy of April 16 may be broader than conventional criminal judicial processes, it nonetheless exposed detrimental assumptions which permeate the process as well as theories and practices of restorative justice. We may expand our perspective to invite structures from beyond governmental processes to inform the restorative framework. We may step out of narrow processes and seek ways for victims to identify themselves and to describe their own harms and articulate their own needs. Within stories of harm, restorative powers emerge. We need to listen to the stories to find that power, identify the participants, and understand the harm. From there, we will find the weak places from which we can become strong.

After the shootings, the children responded, and in their response, there were no hierarchies of needs or stakeholders to balance rights. An elementary school student from Florida, Alena P. Lewis, wrote a note to the University following the tragedy: "I feel so sorry for the people who got shot. . . . And for the people [that] are still alive please take care of yourself."⁸⁷

CONCLUSIONS

*In the last quarter century . . . I've struggled with the
Right to remain silent.
But not on changing end words.*

*Legal Aid Lawyer: I learned that when a young
mother is killed in front of her six year old son—
the survivors (and their advocates) are abandoned—holding an
empty gratitude for a sentence of "life without."
Wondering (decreeing) which grandparent should raise the child.*

second." Gordon Bazemore & Dee Bell, *What Is the Appropriate Relationship Between Restorative Justice and Treatment?*, in *CRITICAL ISSUES IN RESTORATIVE JUSTICE* 119, 119 (Howard Zehr & Barb Toews eds., 2004).

87. *Today, We Are All Hokies*, VA. TECH MAG., Memorial Issue, May 2007, at 29, available at <http://www.vtmagazine.vt.edu/memorial/07/today.html>.

*Prosecuting Attorney: I witnessed the destruction of multiple
generations by sexual abuse within one family.
The firestorm engulfing child,
mother, cousins, aunts, uncles.*

*Legislative lawyer: I drafted statutes that piled on
Punishments only to have the state plunge into debt to build more
prisons, write statutes, build prisons, write statutes, et. al., et. al., et.
al.*

*Student of restorative justice: I gained understanding
Of a new way to justice (peace) only to uncover
promising processes blindly adhering to the crumbling pillars of the old ways.*

*Mother of student attending Virginia Tech on April 16, 2007:
Pain gushing through every egress of consciousness—
Seeking.*

*Even after all of the rest (the quarter century)
I'm surprised.
All in all, a struggle to define harm,
name those affected, identify their role, and satisfy their needs (or
their rights).
No stopping the struggle—careful hunting for answers.
Once upon a time I looked only in the facts, statutes, and
precedent—
giving way to theories of restorative justice.
Today, I look in a sestina.*

Why a sestina? Is it possible that a sestina is a special form of a poem that holds mystical powers? Could a sestina be a starting point to cradle the experience of those harmed while contemporaneously allowing a broadened understanding and examination of harm? Would that greater understanding expand potential restorative powers of a process? What benefits do restricted forms of statutes and procedures offer in a broad search for survival, justice, and peace? Professor Lucinda Roy wrote a sestina after April 16.⁸⁸ She selected

88. "Sestinas are composed of six six-line stanzas with the same six end-words repeated

her six end words, but then rewrote them: “‘*Seung, sunglasses, sorrow, stone, silence, and guns.*’ I realize that, to survive, I must choose another six end-words . . . *students, teachers, beauty, voice, reconciliation, and peace.*”⁸⁹

*Today is Friday, March 28, 2008.
Sitting in a classroom at Virginia Tech:
“English Department Undergraduate Conference.”
Can I sit here and ignore Cho’s presence?
Posted by the door a sign lists instructions to address suspicious persons.
And locking doors.
I feel, see, hear the OWEHA here.
No list.
No prescribed rights, listed stakeholders, balancing tests.
Shared experiences of pain, faith, hope, love.
Living a life—seeking a justice—that is their own.*

*Professor Roy begins.
She had had a difficult time speaking since the tragedy in April:
“It’s not that I forget too much but that I remember too well.”
These words feed my breath and carry me to the next moment.
I write them in my program.
Investigation and reflection are the building blocks of a
Strong Culture.
Moving now in
Blessed Illumination.
“Writing reshapes memory as the waves reshape the shore.”*

*The students testify, illuminate, reshape.
Xavier speaks of sorrow in the other.
Joe of losing one that he loves in a fire.
Heather didn’t want to write about 4-16, but . . .*

in a different order at the end of each line, followed by a final three-line stanza” ROY, *supra* note 11, at 56. Recall that when Cho wrote his, he chose the end words: “LOSER, house, dream, lives, life, and world.” *Id.* at 57.

89. *Id.* at 61.

Poet and Virginia Tech student Heather Lockwood:

This is a love poem.
This is the look in two by millions
because we can see them,
we can see them with reflections in our hands and
with our two eyes into their two eyes and they are alive . . .
. . . This is a love poem.
This is my core stretching beyond my fingers and mind
stretching to touch someone who needs some faith,
faith that despite it all, whatever all may be,
we will learn and hold and hope and accept
And take the hand of another
And see the eyes of another
And let the rain fall from the stares of compassion
And This is a love poem.
This is for you.

—Heather Lockwood⁹⁰

*My son, Dashiell, walks to the podium.
A vase of lilacs balances on its edge.
(A young man gently grasps the hand of woman seated beside him—
As though at a wedding, or funeral.)
Dash's voice shakes as we read.
Tiny tears (nearly invisible.) Illuminate. Reshape.*

9.11.2007

As I walk across the dirty ground
damp grass flattens beneath the soles
of shoes that have seen too many miles,
yet still hang tight to my tired feet.
“Let it Be”
rings in my ears.

90. Heather Lockwood, February 14, 2008, Presentation at the Virginia Tech English Department Conference (Mar. 28, 2008) (unpublished poem, Virginia Tech University) (on file with author).

A chorus of words,
teaching me,
reminding me,
each and every time
they repeat.
To my life
hundreds,
or thousands,
of tiny American flags
commemorate one great loss
in our lives.
But to right
32 grey stones
commemorate quite another.
The building still stands
just beyond these tiny grey reminders.
The building,
the classrooms,
the stones,
Remain as a reminder of everything lost that day.
Not only our people and our souls,
but also the innocence
and simplicity, education once held.
All the while
a half mast flag
hangs, as a blanket.
Is that their attempt
to offer solace,
or escape,
or comfort?
For tribute is not nearly enough.⁹¹

91. Dashiell Quasebarth, 9.11.2007, Presentation at the Virginia Tech English Department Undergraduate Conference (Mar. 28, 2008) (unpublished poem, Virginia Tech University) (on file with author).