Restorative Justice

Ideas, Values, Debates

GERRY JOHNSTONE

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Willan Publishing
Culmcott House
Mill Street, Uffculme
Cullompton, Devon
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Preface

In recent years, a new way of thinking about how we should view and respond to crime has emerged and is beginning to make significant inroads into criminal justice policy and practice. Called restorative justice, it revolves around the ideas that crime is, in essence, a violation of a *person* by another person (rather than a violation of legal rules); that in responding to a crime our primary concerns should be to make offenders aware of the harm they have caused, to get them to understand and meet their liability to repair such harm, and to ensure that further offences are prevented; that the form and amount of reparation from the offender to the victim and the measures to be taken to prevent re-offending should be decided collectively by offenders, victims and members of their communities through constructive dialogue in an informal and consensual process; and that efforts should be made to improve the relationship between the offender and victim and to reintegrate the offender into the law-abiding community.

During the past decade, restorative justice has been promoted – often with evangelistic fervour – as the way forward for criminal justice, which is allegedly failing to prevent crime and to provide victims and communities with a satisfactory experience of justice.[1] These alleged failures are attributed, by restorative justice proponents, to the criminal justice system's adherence to a 'retributive' lens or paradigm, according to which offenders must be judicially punished and the state must take control of the process (Zehr 1990). Advocates have managed to persuade increasing numbers of scholars and practitioners working in the field of criminal justice that a move away from 'retributive justice' in the direction of restorative justice will solve the contemporary crisis in crime

and punishment. Others, however, have greeted such ideas with a mixture of scepticism and distrust.

Such is the interest in restorative justice that there is now an abundance of literature – from a multitude of countries – explaining, describing, advocating or criticising it or specific aspects of it. For the uninitiated, working one's way through this complicated mass of literature is a daunting prospect, especially since – as Paul McCold (1998) demonstrates – there is a huge divergence of opinion regarding what is meant by the term 'restorative justice'. Accordingly, this book provides an introduction to the most fundamental and distinctive *ideas* of restorative justice and to the key arguments both for and against its use. My main aim is to make the phenomenon of restorative justice, and the major debates about it, comprehensible to relative newcomers, whether students of criminology, law or related disciplines or researchers or professionals with an interest in crime and justice issues. At the same time, the book seeks – especially in its latter stages – to extend the range of the debate about the meaning of restorative justice, its pros and cons, and its broader significance. Hence, it will have some interest to those already familiar with the topic.

The aims, scope and rationale of the book are described at greater length in chapter one. Chapter two then outlines the main themes of restorative justice thought and introduces some important critical debates about the prospects for restorative justice and about whether the idea of implementing it on a wide scale is feasible or even desirable.

In the first half of chapter three, I outline the important claim that restorative justice was the standard approach to what we now call 'crime' throughout most of human history and that it is found among nearly all aboriginal groups and in all pre-modern societies. Some dismiss this claim as a myth. I argue, however, that even if this claim is accepted, there are still good reasons for doubting whether it is realistic to think of *reviving* restorative justice traditions in modern cities and towns. Such doubts, and the answers to them, are examined in the second half of the chapter.

Chapters four and five look at how restorative justice aims to involve and meet the needs of victims and offenders. Chapter four describes the restorative approach to crime victims and distinguishes it both from the traditional criminal justice approach to victims and from some other ways which have been proposed and implemented for obtaining a better deal for victims in the criminal justice process. It also asks whether restorative justice as currently conceived is as victim-oriented as its rhetoric suggests. Chapter five describes and seeks to clarify what is distinctive about the restorative approach to offenders. It explores the

key differences between restorative justice, on the one hand, and 'retributive justice' and 'therapeutic justice' on the other, as well as putting forward a positive account of the main features of the restorative response to offenders. The chapter concludes by addressing the highly topical question of whether restorative justice can be properly understood as a non-punitive response to wrongdoing. Chapter six develops this discussion by looking at how the idea of reintegrative shaming, proposed by John Braithwaite (1989), is shaping restorative justice practices and by raising some questions about the ethical issues involved in attempts to shame offenders and simultaneously to promote an attitude of forgiveness.

Chapter seven shifts attention more directly to the question of what is distinctive about restorative justice as a process. It examines, in particular, the rationale for involving victims, offenders and ordinary members of the community directly in the process by which it is decided how to deal with the aftermath of an offence. It shows that, while the standard justification of the restorative justice process involves pointing to its advantages over the conventional criminal process as a method of achieving restorative goals, there is often an underlying suggestion that restorative processes can promote moral development and help to build a sense of community. The chapter goes on to explore the implications of developing this theme for our understanding and assessment of restorative justice programmes.

Chapter eight concludes the book by outlining some different directions which the restorative justice movement might take, and exploring some implications of these different directions both for the movement itself and for the broader field of penal and social control. It also makes some suggestions about some directions which restorative justice research could fruitfully take.

In a short introductory text of this nature, which seeks to describe and examine the ideas and principles of restorative justice in reasonable depth, much else that is of interest and importance will not be covered. In particular, the book does not contain a detailed chronicle of the development of restorative justice, nor detailed descriptions of restorative justice programmes, nor an up-to-date overview of how crime policies are changing in response to the campaign for restorative justice. Nor will the book present in detail the findings of research which seeks to evaluate specific restorative justice programmes (see Braithwaite 1999a; Kurki 2000). And, although the book contains some critical analysis and introduces the main critical perspectives on restorative justice, it is not an attempt at a comprehensive critique; such a critique would require a book in its own right, at the very least. What

would have been interesting, but is excluded on the ground that it is too complex to cover in a short introductory text, is a study of the range of applications of the ideas and principles of restorative justice beyond criminal justice, for example in family life, in schools, in the settlement of business conflicts, in international peacekeeping and in bodies such as the South African Truth and Reconciliation Commission. However, since the ideas and values of restorative justice remain much the same whatever context it is applied in, and since some of the issues raised overlap, I hope that the book will be of some value to those interested in these wider applications of restorative justice.

Acknowledgments

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Notes

1 See Garland (2001: ch. 3) for an account of the 'failure model' of modern criminal justice.

Contents

Chapter 1

Introduction

In public discourse it is commonly taken for granted that the usual response to the commission of a crime should, when possible, be a court trial followed by judicial punishment of the perpetrator. However, reformers have long searched for better, and especially less destructive and more effective, responses to crime. The latest result of this search is *restorative justice*.[1]

Advocates of restorative justice suggest that, once the facts of a crime have been established, our priority should not be to punish the offender but (i) to meet the victim's needs, and (ii) to ensure that the offender is fully aware of the damage they have caused to people and of their liability to repair that damage. Achieving such goals, it is suggested, requires something other than a formal criminal trial and judicial punishment. Indeed, it is argued, the standard process of trial and punishment usually hinders the achievement of such aims. Instead, a face-to-face meeting between the victim and offender, in a safe setting, is required. Ideally, members of the families and communities of the victim and offender will also take part in the process. Professionals will be involved in the process not as chief decision-makers but as facilitators. Their role is to ensure that the parties feel safe and to guide them towards constructive dialogue and a mutually agreeable resolution.

At such meetings offenders are urged to account for their behaviour; victims are encouraged to describe the impact which the crime has had upon them, materially and psychologically; and all parties are encouraged to decide upon a mutually agreeable form and amount of reparation – usually including an apology. Frequently, assurances are sought from the offender that the behaviour will not be repeated. Also,

members of the offender's family and community may resolve to monitor the offender and support them in their efforts to refrain from further law-breaking and anti-social behaviour. There is an emphasis on persuading offenders, without threats, voluntarily to repair the harm they have caused. There is also an interest in *reconciling* offenders with their victims and with the community.

According to its proponents, a shift from judicial punishment to community restorative justice, as the *routine* response to crime, will have a number of benefits. Restorative justice, they claim, will meet the needs of victims of crime much better than judicial punishment. Also, although many offenders will find restorative justice more demanding than undergoing judicial punishment (we are repeatedly reassured that it is not a soft option), they will benefit because restorative justice offers them the chance to regain – or in many cases gain for the first time – the respect of the community rather than its permanent scorn. Communities, it is claimed, will also benefit in a number of ways: offenders will be rendered less dangerous; the large fiscal costs of judicial punishment can be diverted to more constructive and crime-preventing projects; and restorative justice will help foster arts of citizenship and a sense of community which can be useful in other situations (Cayley 1998: 188).

Hundreds of experiments with restorative justice are now taking place throughout the developed world, especially – but by no means exclusively – in relation to young offenders (Galaway and Hudson 1996). Most of these experiments were started by criminal justice professionals, voluntary workers, and allied reformers working within the criminal justice system using powers and structures already available (Cayley 1998). For example, the origins of the contemporary restorative justice campaign are conventionally traced to Canadian experiments with victim–offender mediation in Elmira, Ontario in 1974 (Zehr 1990: ch. 9). Legend has it that probation officer Mark Yantzi (a member of the radical Christian sect, the Mennonites), frustrated with the usual process for dealing with offenders, had a 'pie-in-the-sky idea' (*ibid*: 158). He asked the judge, in a case where two young men had pleaded guilty to vandalizing 22 properties, to order the offenders to meet their victims, in the company of Yantzi and fellow Mennonite, Dave Worth. To their surprise, the judge agreed, ordering the offenders to go with Yantzi and Worth and 'meet your victims and bring me back a report on the damage they've suffered' (Cayley 1998: 216). From this spontaneous, idealistic experiment, restorative justice – in the form of Victim Offender Reconciliation Programmes (VORPs) – was born (or rather reborn since, as we shall see, an important claim about restorative justice is that it is an ancient way of dealing with crime).

In VORPS, restorative justice takes the form of a face-to-face encounter between the victim and the offender, facilitated by a trained mediator, who is preferably a community volunteer (Zehr 1990: 161). The mediator's role is not to impose his or her interpretation or solution upon the 'parties to the conflict', but to encourage them to tell their stories, express their feelings, ask questions of each other, talk about the impact and implications of the crime, and eventually come to an agreement about what the offender will do to make restitution. While welcoming this as an important break with the conventional criminal justice process, some of those currently promoting restorative justice regard VORPs as unsatisfactory because they are 'too individualized and private' (Zehr 1990: 256). According to this view, if restorative justice is really to take place, the *community* must also be involved. From this perspective the more important experiments are those with sentencing circles and family group conferences.

The first official use of a sentencing circle occurred in 1992 in the Yukon Territorial Court in Canada (Cayley 1998: 182). In response to the Crown's assertion that 'the community' wanted a native Canadian – a chronic offender convicted of assaulting a police officer – to go to jail, Judge Barry Stuart invited members of the offender's *actual* community to participate in a sentencing circle, thereby reviving the native way of dealing with troublesome individuals and situations. In a sentencing circle, *interested community people* take part in a discussion of what happened, why it happened, what should be done about it, and what should be done to prevent further such incidents. The judge then passes sentence and makes other orders and recommendations, based on what is proposed by the circle. Although called *sentencing* circles, it should be made clear that the discussion and decisions go well beyond what is conventionally covered in sentencing processes. In particular, circles address issues such as to what extent the community shares responsibility for the crime and for doing something about it.

In the original case, the offender's actual community indicated that they did *not* want the offender to go to jail and that they were willing to help rehabilitate him. Judge Stuart, acting on the community's wishes, ordered two years' probation and the offender responded by changing his life (Cayley 1998: 198–3; Stuart 1996). As the reputation of this case spread, the practice of circle sentencing proliferated throughout native communities in Canada and elsewhere and some argue that it should be applied throughout the whole of modern society (Cayley 1998: 197–8).

A form of 'aboriginal justice' which has already been embraced more widely is the Family Group Conference (FGC). FGCs were introduced

by statute in New Zealand in 1989 as a new forum to deal with youth crime as well as youth care and protection issues (McElrea 1994). Their introduction owed something to Maori concerns about the over-representation of Maori youth in custodial penal institutions; FGCs are purportedly informed by Maori justice practices and philosophies (*ibid*: 98–9; Pratt 1996). FGCs are similar to the VORPS described above, in that they are forums for 'feelings to be expressed, facts to be explored, and settlements to be negotiated' (*ibid*: 258). However, a wider range of people are involved in the encounter. The offender is typically accompanied by members of his or her family and sometimes by other people who have a relationship of care with them. Victims also bring along members of their family and other 'supporters'. In addition, members of criminal justice agencies such as the police take part. The agreement which is aimed at involves not only restitution but an action plan designed to address the underlying causes of offending behaviour and thereby prevent reoffending (Masters and Roberts 2000: 142).

In the early 1990s, the police in Wagga Wagga – a small city in New South Wales, Australia – started an experiment in 'conferencing' using their common law powers of cautioning (Moore and O'Connell 1994). These experiments were strongly influenced not just by the New Zealand FGCs, but also by John Braithwaite's theory of *reintegrative shaming* (Braithwaite 1989; Masters and Roberts 2000: 145). Braithwaite argued, in an enormously influential book, that family and community shaming directed at offenders – provided it was done within a context of respect for offenders and was followed by efforts to reintegrate them – was an extremely powerful form of social control, but one which most western societies had rejected to their cost. In the 'Wagga model', FGCs were conceptualised as forums in which offenders would be confronted with such reintegrative shaming.

Conferencing, and especially the Wagga model, has proliferated internationally with astonishing speed. It was introduced in the United Kingdom (UK) in the mid-1990s by the Thames Valley Police and has since been adopted by numerous other UK police forces (Pollard 2000). Indeed, although there had been some small-scale experiments with victim–offender reconciliation in the UK in the early 1980s (Smith, Blagg and Derricourt 1988), and although Martin Wright had explained the restorative ideas and principles underlying VORPS in an influential book (Wright 1996a, first edition 1991), it was only when the police started to experiment with 'restorative cautioning' that the restorative justice movement really took off in the UK (Johnstone 1999). One result of this is that, in the UK, restorative justice has come to be closely identified with Braithwaite's theory of reintegrative shaming and the

Wagga model of conferencing. The broader ideas and values of restorative justice – and the wider range of ways in which attempts have been made to put these ideas and values into practice – have tended to be overlooked. This situation is changing, however, among some restorative justice activists in the UK, who are beginning to explore the opportunities – created by the Crime and Disorder Act 1998 and the Youth Justice and Criminal Evidence Act 1999 – for introducing restorative justice in the youth justice system. In these attempts, the importance of developing, or holding on to, a broader conception of restorative justice is increasingly being stressed (Masters and Roberts 2000: 152–3).

Yet, despite the growing interest in the development of restorative justice – as well as the growing concern in some quarters about this development – the broad phenomenon is still little understood, and often positively misunderstood, by those not directly involved in restorative justice advocacy and practice. One significant misunderstanding is the tendency to see restorative justice as rehabilitation repackaged (Daly 2000a: 45). A quite different mistake, frequently made, is to see it as part of the victims' rights movement (Cayley 1998: 218). These mistakes no doubt occur because the aims of restorative justice do overlap with those of rehabilitation programmes and those of the victims' rights movement. However, such mistakes are also encouraged by certain ways of presenting the case for restorative justice. Hence, explaining what restorative justice is about is a complex task which sometimes involves criticizing as inaccurate and misleading the self-understandings and self-representations of its leading advocates and practitioners.

A more general mistake is the frequent failure to appreciate that the argument for restorative justice is as much, if not more, about the purposes and values which should guide our responses to crime as it is about the best methods of accomplishing existing goals such as preventing future offences (Morris and Young 2000). This book addresses this issue by paying particular attention to the range of goals and values embodied in the practice of restorative justice, emphasizing that for many advocates and practitioners preventing or reducing crime is by no means the only, and not even the top, priority. Hence, the book seeks to counter the pervasive tendency to think of restorative justice simply as a new technique for controlling crime.

In addition to explaining what restorative justice is about, the book also presents some critical analysis (albeit sympathetic critical analysis) of the ideas of restorative justice. It is therefore worth saying a few

words, at this stage, about what I think a critical analysis of restorative justice entails.

As we have seen, proponents of restorative justice have made a number of claims about the advantages of restorative justice over more conventional ways of dealing with crimes, especially that it outperforms judicial punishment in reducing reoffending and satisfying victims. Lots of 'scientific evaluations' of restorative justice programmes – designed to put such claims to the test by comparing their achievements with those of more conventional criminal justice interventions – have been carried out or are currently under way. Such programme-by-programme evaluations have tended to dominate the restorative justice research agenda, while other forms of assessment have tended to be neglected (Dignan 2000). In my view, this is a mistake. While 'programme evaluations' are important, it is crucial to realise that critical analysis of restorative justice should not end, and arguably not even begin, with attempts to ascertain whether restorative justice programmes actually achieve the measurable 'outputs' that most of their proponents claim they will achieve. So, what else does critical analysis involve?

First, it is crucial to realise that what proponents of restorative justice propose is not simply a new programme or a new technique but something much more ambitious: a fundamental change in our manner of viewing and responding to criminal acts and associated forms of troublesome behaviour and of relating to both those who commit such acts and those affected by them. To subject such a proposal to critical evaluation we need to ask how practicable the proposed transformation is and, considered in the round, whether it would make things better or worse (bearing in mind that the criteria of 'better or worse' are not only highly contestable, but that proponents of restorative justice are involved in the contest). To put this briefly we need to ask: to what extent is a shift from judicial punishment to restorative justice, as the normal response to crime, feasible and desirable?

Throughout the book we will encounter arguments which suggest that such a shift is highly unlikely to occur. However, while I will look at responses to those arguments, the main focus will be on questions about the desirability of such a shift. The main reason for this emphasis is that, regardless of whether it is feasible, restorative justice is of interest and importance as a 'sensitizing theory' (Zehr 1990: 227). What is meant by this is explained by Howard Zehr, an early and leading proponent of restorative justice. He is willing to concede that 'retributive justice' *may* be so deeply embedded in our institutions and minds that it may be unrealistic to expect fundamental change (*ibid*: 226–7). Yet he insists that development of the concept of restorative justice, through academic

work and practical experiment, is a necessity. Such development enables us to understand that judicial punishment is a social *choice*, not a natural or inevitable response to crime, and it lays bare the nature of that choice. Developing the concept of restorative justice therefore enables us to question the rightfulness and reasonableness of that choice, and gives us the option of acting differently in areas of our lives where we might have some control, such as in our families, daily lives and perhaps in our schools (*ibid*: 227).

So, how do we approach the question of whether a move towards restorative justice would make things significantly better, or worse, than they currently are? First, it is necessary to recognise that, for all its troubling features, in its current form the institution of judicial punishment does perform certain essential functions tolerably well. It provides most of us, regardless of our means, with *some* degree of protection from predatory and harmful behaviour, without making us pay the price of oppressive conformity. Moreover, it meets some of our criteria of fairness to some extent, and gives some degree of recognition and protection to the rights of those accused of crime. It even provides some offenders with some protection from vengeful victims and angry members of the public. Further, under certain conditions, it can help disseminate efficiently progressive ideas of what is right and what is wrong. This is not to deny the charges of those who accuse judicial punishment of being cruel, unjust and ineffective and of often creating or at least exacerbating the very problems it purports to solve (Bianchi 1994). Nor is it to deny that there may be something much better than judicial punishment. Rather, it is simply to acknowledge that – for all its faults – the institution of judicial punishment does have certain merits and those who would replace it with something else – either as a general policy or in any particular case – need to be sure that they do not throw the baby out with the bathwater. We need to ask of proponents of restorative justice how careful and balanced is their critique of judicial punishment, and how will they ensure that the essential tasks which judicial punishment does perform tolerably well continue to be performed at least as well.

What this means is that – even if we accept the claims that a shift to restorative justice would in many ways improve the lot of offenders, victims and communities – we still need to be alert to the ways in which it could make things worse. We need to ask whether a shift to restorative justice would result in a whole range of deleterious consequences such as a trivialisation of evil, a loss of security, a less fair system, an undesirable extension of police power, an erosion of important procedural safeguards, unwelcome net-widening, or a weakening of already weak