RESTORATIVE JUSTICE

Edited by
Carolyn Hoyle

CRITICAL CONCEPTS IN CRIMINOLOGY

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Critical Concepts in Criminology

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Stumbling Blocks on the Road to a Restorative Jurisprudence

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IN SEARCH OF RESTORATIVE JURISPRUDENCE

John Braithwaite

Source: L. Walgrave (ed.) *Restorative Justice and the Law*, Cullompton, Devon: Willan Publishing, 2002, pp. 150–67.

The restorative consensus on limits

It is of course far too early to articulate a jurisprudence of restorative justice. Innovation in restorative practices continues apace. The best programmes today are very different from best practice a decade ago. As usual, practice is ahead of theory. The newer the ideas, the less research and development (R&D) there has been around them.

Within the social movement for restorative justice, there is and always has been absolute consensus on one jurisprudential issue. This is that restorative justice processes should never exceed the upper limits on punishment enforced by the courts for the criminal offence under consideration. Retributive theorists often pretend in their writing that this is not the case, but when they do, they are unable to cite any scholarly writings, any restorative justice legislation or any training manuals of restorative justice practitioners to substantiate loose rhetoric about restorative justice being against upper limits or uncommitted to them. Moreover, the empirical experience of the courts intervening to overturn the decisions of restorative justice processes, which has now been considerable, particularly in New Zealand and Canada, has been overwhelmingly in the direction of the courts increasing the punitiveness of agreements reached between victims, offenders and other stakeholders. In New Zealand, for example, Maxwell and Morris (1993) report that while courts ratified conference decisions 81 per cent of the time, when they did change them, for every case where they reduced the punitiveness of the order there were eight where they increased it. Similar results have been obtained in the Restorative Resolutions project for adult offenders in Manitoba (83 per cent judicial ratification of plans, with five times as much modification by addition of requirements as modification by deletion) (Bonta *et al.* 1998: 16). While there were no cases where the restorative process recommended imprisonment and the

court overruled this, there were many of the court overruling the process by adding prison time to the sentence.

Retributivist voices have been absent in condemnation of excesses of courts in overturning non-punitive restorative justice outcomes while persisting with rhetoric on the disrespect of restorative justice for upper limits. I suspect this is not a matter of bad faith on their part, but simply a result of their acceptance of a false assumption that the problem will turn out to be one of punitive populism as the driver of punitive excess.

Secondly there is near universal consensus among restorative justice advocates that fundamental human rights ought to be respected in restorative justice processes. The argument is about what that list of rights ought to be. I have suggested that there could be consensus on respect for the fundamental human rights specified in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Second Optional Protocol, the United Nations Declaration on the Elimination of Violence Against Women and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Braithwaite 2002b) While restorative justice advocates would agree that it can never be right to send an offender to a prison where his fundamental human rights are not protected, in Australia there is never likely to be consensus on whether it can be right to allow traditional Aboriginal spearing as an indigenous response to the problem of Aboriginal deaths in custody. The dilemma here is that for some traditional Aboriginal people in outback Australia, imprisonment is a fundamental assault on their human rights because it deprives them of spiritual contact with their land, which is everything to their humanity. When they feel strongly that ritualized spearing is less cruel and more reintegrative than imprisonment, little wonder that here it is difficult for westerners to be sure about what is right.

Basically, however, the restorative justice consensus on limits and rights is very similar to the retributive consensus: there ought to be upper limits on punishment, while there is disagreement on what should be the quantum of those upper limits, and fundamental human rights should constrain what is permissible in justice processes, with disagreements about what some of those rights should be and how they should be framed.

Ferment on proportionality

Where there is both strong disagreement between restorativists and retributivists, and among restorativists themselves, is on proportionality. Some restorativists are attracted to calibrating the proportionality of restorative agreements in terms of whether the repair is proportional to the harm done. This cuts no ice with retributivists who see this as a tort-based form of proportionality. For retributivists, punishment must be proportional to culpability. The harm in need of repair is only one component of culpability. An attempted murder where no one is hit by the bullet

is more culpable than injuring someone seriously as a result of unintentionally or slightly exceeding the speed limit. Such restorative proportionality is also unattractive to cultures who seek healing by allowing victims to give a gift to the offender (for examples, see Braithwaite 2002a: Box 3.3). The grace that comes from such gift-giving by victims can be helpful for their own healing and trigger remorse in offenders. It might be nurtured as a practice attractive to a number of cultural groups present in Western societies, not condemned as negative proportionality when what is required is positive proportionality.

For my part, I am not attracted to any conception of proportionality in restorative justice programmes. Limits are essential, but an upper constraint is quite a different matter from believing that the amount of punishment or repair ought in some way to be proportional to the seriousness of the crime. It may be that an underlying difference between retributivists and people like myself is that while retributivists tend to be deeply pessimistic that whatever the justice system does will make little difference to the safety of people. In contrast, my theoretical position is that poorly designed criminal justice interventions can make the community considerably less safe and well designed ones can help make it much safer. While it seems true that most attempts to reduce crime through restorative justice, rehabilitation, deterrence and incapacitation fail in the majority of cases where each is attempted, it is also true that all of these things succeed often enough for it to be true that there are cost-effective ways of reducing crime through best-practice restorative, rehabilitative, deterrence and incapacitative programmes. More importantly, I am an optimist that through programmes of rigorous research we can learn how to design a criminal justice system that has places for restorative justice, rehabilitation, deterrence and incapacitation that cover the weaknesses of one paradigm with the strengths of another. Through openness to innovation and evaluation, it should be quite possible for us to craft a criminal justice system that is both more decent in respecting rights and limits and more effective in creating community safety.

There is no evidence that upper limits inhibit this R&D aspiration. If they did, from my republican perspective we would have to scale back our aspirations (see Braithwaite and Pettit 1990). But there is no dilemma here. It is not true that if only we could execute murderers, or boil them in oil, we could reduce the homicide rate. There is no reason for thinking that we could reduce crime by locking up first-time juvenile shoplifters for five years. If it reduced shoplifting without generating subcultural defiance, it would only do so by shifting resources away from combating much more serious crimes.

Unlike upper limits, proportionality is an obstacle to crime prevention. In my corporate crime work, I believe I have shown persuasively that mercy for corporate criminals (disproportionate leniency) is often important for making the community safer (see Braithwaite 1984, 1985; Braithwaite and Pettit 1990). That is why corporate regulators have policies that they inelegantly call leniency policies. Regulators routinely face a choice between the out and out warfare of a criminal prosecution aimed at incarcerating the CEO and cutting a deal where the company agrees to increasing its investment in safety, internal discipline, staff

retraining, in internal compliance systems and industry-wide compliance systems, and to compensation to victims in return for dropping criminal charges against top management. Or the individual penalties are reduced in a plea agreement that keeps top management out of prison. The reason this mercy works is that the power of major corporate criminals for ill is matched by their power for good. The consequentialist impulse is to harness that power for good. Once we have done that, we must be troubled by the fact that while power is the reason we let the white corporate criminal free, it is also the reason we lock up the black street criminal. The social movement for restorative justice here might set as its aspiration showing the path to progressively reduce the incarceration of the poor in a way that increases community safety. This is no less plausible a policy idea than largely dispensing with the incarceration of corporate criminals in a way that increases community safety.

Obviously, we can never hope to do either if we are morally constrained in both domains to inflict punishment proportional to the wrongdoing. Many retributivists are attracted to Hart's (1968) move of seeing consequentialist considerations as general justifying aims of having a criminal justice system, but proportionality as a principle that should guide the distribution of punishments. A justifying principle that is consequentialist; a distributive one that is retributive. This is the formulation that appeals to von Hirsch (1993), for example. But what if I am right that proportionality destroys our capacity to experiment with crime prevention programmes that sometimes grant mercy, sometimes not, depending on the responsiveness of offenders to reform and repair, or depending on the agreement of victims and other stakeholders in restorative processes that this responsiveness justifies mercy? If I am right that often it will prove to be in the interests of community safety to give offenders other than a proportionate punishment, the Hartian principle of distributing punishment will defeat the general justifying aim of having an institution of punishment. That is, if we honour the distributive principle of proportionality, we will increase crime. The effect of the distribution will be to defeat the aim of establishing the punitive institution. The Hartian move of separating justifying and distributive principles is incoherent. It is only rendered coherent by the empirical assumptions that punishment reduces crime, and that while excessive punishment might reduce crime even more, we must place proportionality constraints on the pursuit of that good.[1] That is, the general justifying aim is to reduce crime through punishment. While we might achieve that aim even more through disproportionately heavy punishment, we still achieve it by proportionate punishment. If, on the other hand, these empirical assumptions fall apart in the way I suggest, then the distributive principle actually defeats the justifying aim of reducing crime (instead of simply limiting it).

Proportionality is a hot issue with surveillance and policing, just as it is with 'sentencing'. Just as there is a liberal impulse for equal punishment for equal wrongs, there is also the compelling intuition that black people should not be subject to more police surveillance than white people. This is the dilemma in US