

Accountability and Responsibility Through Restorative Justice

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The Accountability Crisis as a Crisis of Democracy

Accountability does not work well through the traditional modalities outlined by Michael Dowdle in Chapter 1. In contrast to the 18th and 19th century origins of modern democracy, today we mostly vote for representatives we have never met. They no longer hear our voice in town meetings. Once elected, they go to a legislature on the floor of which few of the major issues that affect our lives are discussed. Most of the really big decisions are made by the circle of policy advisers around the head of state, while a much larger number of middling decisions are taken within public and private bureaucracies without debate in the legislature. So our vote is not the accountability tool it once was. Private law accountability is something only corporations and a tiny number of wealthy individuals can afford, and widespread private prosecution of both what we today call public and private law is no longer something the law allows in the way that was standard up to the 19th century (King, 2000; Langbein, 2003). We have more private wealth, even as it becomes more unequally distributed, so we do exercise minute market accountabilities by switching consumer choices more frequently than we did when we were poorer. Perhaps because of the latter, many citizens are satisfied enough, quiescent, not much interested in

voting or going before the local magistrate to have their say. Others are cynical and see modern democracy as a sham. They crave voice and political choice on matters that affect them rather than just consumer sovereignty.

Most analysis of this accountability deficit is directed at the executive and legislative branches of governance, often using the judicial branch as a remedy, as for example by executive branch transparency that can be enforced in courts. This essay explores the different path of enriching direct democracy and accountability within the judicial branch. Restorative justice as an accountability innovation has developed mostly as an experiment in re-democratising criminal law. While this essay focuses on this core arena of research and development of restorative justice as in innovation, we must understand that restorative justice is a wider strategy of confronting injustice in any arena where injustice occurs. Injustice in the way states fight wars can be confronted by restorative justice strategies such as truth and reconciliation commissions. Injustice in the way children are treated in schools can be confronted by restorative anti-bullying programs. Injustice in the way large private bureaucracies treat us as employees or consumers can be confronted in restorative justice circles or conferences. Unjust treatment by public bureaucracies, such as tax offices, is equally a site of restorative justice R and D.

Jerry Mashaw points out in Chapter 2 that accountability occurs through state governance, private markets and social networks, but that these accountability regimes do blend into one another. Many accountability reform programs are about expanding these accountability overlaps. So the

rise of the regulatory state is largely about making market actors more accountable when they inflict troubling externalities. The human rights movement is partly about mobilizing the state to call to account the networked governance of families, for example, to respect the rights of women and children. The New Public Management is about infiltrating market accountability into state governance. Restorative justice is one approach to infiltrating networked accountability into markets and state governance. I will argue that it has the virtue of resolving the infinite regress problem within the political, administrative and legal accountabilities discussed in Mashaw's Chapter. There is now a vast literature on the problems and prospects of restorative justice, including more than 50 empirical program evaluations. The contribution of this Chapter will be limited to developing a new normative approach to accountability and responsibility in restorative justice, focusing on criminal law. Its importance is in illustrating the possibility of infiltrating a more participatory approach to accountability into all institutions of private and public governance at any point where injustice is experienced (and thereby creating incentives for organizational investment in injustice prevention). Of course possibilities are not empirical realities; the intent is to provide a theoretical framework to motivate evaluations of how different innovations in restorative accountability actually work out.

The Argument Summarized

Restorative justice is conceived as a horizontal process of democratic deliberation that is integrated into external processes of accountability to courts and the rule of law. This integration of direct democracy and the rule of a representative democracy's laws is an opportunity to enrich thinking

about the relationship between responsibility and accountability in a democracy. Responsibility is conceived here as an obligation to do some right thing; accountability as being answerable to give a public account of some thing. The restorative justice ideal of responsibility is active responsibility as a virtue, the virtue of taking responsibility, as opposed to passive responsibility we are held to. The restorative justice method for engendering active responsibility is to widen circles of accountability. Enculturation of active responsibility drives injustice prevention before the event, so the demand for accountability after the event is reduced. This is conceived as part of a civic republican institutional design of *a circle of widening circles of deliberative accountability*.

When responsibility is taken and accounts accepted as sufficient to acquit that responsibility, justice is done. From a restorative justice perspective, justice is always unfinished business until an account has been accepted by the stakeholders in the injustice. Even when the state intervenes to hold someone passively responsible by imprisonment after they fail to take sufficient active responsibility for their wrongdoing, there should be no giving up on active responsibility. Responsibility may be admitted and acquitted on release from prison. Victims, with the family of the offender and other stakeholders, may accept the offender's account at that time with considerable benefit to all if they choose to be involved. Injustice on all sides may still be hurting at the time of release, so justice can still heal then. Deeper democracy, on this account, is one where the institutional preference is for responsibility that is active rather than passive, bottom-up rather than top-down, but where failure of bottom-up responsibility results in a form of

state accountability that never gives up on restoring bottom-up accountability.

The Concept of Restorative Justice

Restorative justice is a process to involve, to the extent possible, those who have a stake in an injustice to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible (adapted from Zehr and Gohar, 2003: 40). Restorative justice shares much in common with other Alternative Dispute Resolution ideologies like mediation. One important difference is that restorative justice facilitators are not morally “neutral” about mediating “conflicts”. Restorative justice is about righting the wrongs of injustices. A restorative justice conference to confront domestic violence is not morally neutral about violence as merely a conflict between two people. Most mediation is between two parties to a conflict; restorative justice views it as morally important to give an opportunity for all those who see themselves as key stakeholders in an alleged injustice to participate in the deliberation about what to do. So the predominant structural form of restorative justice is deliberation among people seated in a circle, as opposed to two people negotiating across a table. Empirically, the outcomes from a plurality of stakeholders sitting in the restorative justice circle tend to be different to those from dyads assisted by professional mediators. Some think they are often better outcomes (Braithwaite, 2002). Restorative justice is not morally neutral about what are good outcomes. It is value-driven. This is not to suggest that it is settled what those restorative justice values are. One of them is certainly that because injustice hurts, justice should heal. This has meant that in fields where restorative justice has now been extensively experimented with - criminal law, care and

protection of neglected or abused children, societies recovering from armed conflict, and business regulation - restorative justice has meant more serious consideration being given to non-punitive outcomes than extant disputing practices.

Most nations have a considerable investment in restorative justice programs today, ranging from nations like New Zealand where it is a universally mandated process for juvenile crime, to nations like Norway and Austria where the volume of restorative processing is very high, to societies like the United States where most programs are tiny and at the margins of the criminal justice system.

Restorative Justice: Democratically Experimental¹ but Unaccountable?

Responsibility and accountability are recurrent worries about restorative justice. They are articulated at many levels. Is it right that a restorative justice process like the South African Truth and Reconciliation Commission fails to hold many of the major criminals of Apartheid criminally responsible for their murderous activities? What about accountability to the community when a meeting of victims of a crime and an offender does a deal that gives a lot of compensation to the victims but little guarantee of future protection to the community? Is restorative justice accountable to a rule of laws enacted by legislatures elected by the people? The list of particular concerns about responsibility, accountability and restorative justice is so long (see, for

¹ Dorf and Sabel (1998). Research and development on restorative justice has also been experimental in a scientific sense. The Centre for Restorative Justice at the Australian National University in 1995 commenced a number of randomized control trials on 1300 criminal cases randomly assigned to court versus a restorative justice conference. Research/practitioner groups from Indiana, Pennsylvania and the United Kingdom subsequently visited the Canberra experiment and then conducted a number of follow-up randomized controlled trials in their own jurisdictions. Preliminary evaluation results as of 2002 are summarized in Braithwaite (2002: Chapter 3) and Strang and Sherman (forthcoming).

example, Brown, 1994; Warner, 1994) that I will not try to address them in all their particulars.² Rather I will attempt to do so in an abstract way that attempts to cut a swathe through many of these particular concerns. The next section argues that holding wrongdoers responsible by imposing punishments for past wrongs is only one version of what responsibility can mean. An active version of responsibility is proposed (following Fisse (1983), Bovens (1998) and Braithwaite and Roche (2000)) as the stuff of a more meaningful jurisprudence of responsibility.

On accountability, most of the concerns about restorative justice rest on a belief in the virtues of hierarchical accountability. Roche (2003) concludes from his survey of accountability in 25 restorative justice programs across 6 nations that while hierarchical accountability to prosecutors and courts that sit above restorative justice circles do useful work, horizontal deliberative accountability of one actor in the restorative justice circle to others in the circle does more work in practice³. For example, accountability of the police for excessive use of force during arrest, or for coercing an innocent person to confess, may be more likely to be forthcoming within the circle from a mother who pleads with the circle that her son has been unfairly treated. In a court case, such a mother will be silenced unless she is called as a witness relevant to the conduct of the offender, as opposed to the conduct of the police. As Dolinko (2003) has pointed out, in the case of an innocent offender coerced into a guilty plea, he will find it impossible “to discuss with the victim what he's done and how to repair the harm he's caused when

² An attempt to do so can be found in Braithwaite (2002: Chapter 5).

³ While the conception of vertical accountability is akin to Scott's (2000: 43) conception of upwards accountability to courts and regulators, the conception of deliberative horizontal accountability to citizens in the restorative justice circle deployed here and in Roche (2003) is more like Scott's downwards accountability than his horizontal accountability as accountability of one institution to parallel institutions.

he knows quite well he has in fact done nothing and has caused no harm. And even if his participation in a conference could somehow be secured, the conference will hardly be a success – the putative offender will simply insist "I'm innocent; they're framing me; I didn't do anything to you and there is nothing for me to 'restore' or 'repair'!" Again, the accountability mechanism that is doing the work here is horizontal deliberative accountability in the restorative justice circle for an account of how we could repair harm to a victim when we have not inflicted any harm upon them.

In criminal cases, Roche (2003) argues that there are some simple reasons why empirically it turns out that deliberative accountability in the circle does more of the work of accountability than accounts to higher-level institutions like directorates of public prosecutions and courts. One is timeliness. An obligation to give an account that occurs in the circle in the process of making a decision elicits immediate responses from other stakeholders: "That's no excuse." "Is that all you are proposing to do?" "What about the emotional havoc this has heaped upon your mother?" Such contestation of accounts inside the process of deliberation more often than not attracts an immediate response: "What I want to say to mum is that I recognise that. I am so sorry mum. I will never cause you that pain again." This example of giving an account is not casually chosen. It is meant to illustrate Strang's (2002) empirical conclusion that emotional reparation like this turns out to be more important to accountability being accepted in the circle, even to victims of violent crime, than material reparation. Immediate face to face accountability therefore not only has the virtue of timeliness, it also has the virtue of authenticity of emotional communication in the giving of accounts.

Emotional authenticity also builds commitment to follow through on accountability. One of the puzzles to those who have not experienced the emotional power that can be generated in a restorative justice conference for serious crime is why compliance is more likely to happen with a victim compensation agreement or community service agreed as a voluntary, non-enforcible outcome of a conference than with the legally enforceable order of a court. One reason is that the emotional dynamic of the offender discussing with a victim the pain she has suffered builds commitment when the offender promises to do something to try to heal that hurt. But second, commitment to follow through is built among other stakeholders in the circle. An offender promises to attend an anger management program. His mother says he was ordered to an anger management program last time he offended. An uncle is moved to say: "This time I'll take responsibility for making sure he goes. I'll pick him up every Tuesday night to get him there." Then the uncle becomes a signatory of a conference agreement that says this particular responsibility belongs to him. Roche (2003: 159) found the most elaborated version of this kind of commitment-building to accountability in two American programs that institutionalised a "celebration circle" that reconvened the stakeholders when all the undertakings in the agreement were successfully completed. As a matter of research evidence, we cannot be sure which of the foregoing mechanisms is most important to the superior accountability restorative justice delivers. What we can now be reasonably sure of is that it does deliver it. In a meta analysis of 32 restorative justice evaluations by the Canadian Department of Justice, the biggest, most statistically robust, effect size was that completion of restorative justice agreements was higher than compliance with orders/agreements in control groups (Latimer, Dowden and Muise, 2001). A subsequent review by

Poulson (2003: 187-189) combined data from several studies to show that both offenders and victims were significantly more likely to perceive offenders to be “held accountable” in restorative justice cases compared to controls that went to court.

Accountability's Infinite Regress Problem

Now let us return to juxtaposing the immediate deliberative accountability in the circle to the delay of hierarchical accountability. The biggest problem with hierarchical accountability is that it is hierarchical. By this I mean that an infinite regress of accountability is required. If guardians of accountability are arranged in a hierarchy as in the left hand side of Figure 1, we have a problem when the top guardian is corrupt. And unfortunately criminal justice institutions such as police departments, and indeed whole states, are like fish; they rot from the head down. The only solution to the corruption of n th order guardians is to add an $n+1$ th order guardian. But if we arrange guardians of accounts in a circle (Figure 1, right side) each guardian can be a check on every other guardian. We can escape from the infinite regress of hierarchical accountability. The more separated public and private powers there are in a polity, the richer the checking of one guardian by many other guardians can be (Braithwaite, 1997). So abuse of power by a restorative justice conference might be checked by a prosecutor, while abuse of power by the prosecutor might be checked by a court, the media, human rights NGOs, or indeed by a restorative justice circle reporting a complaint about the prosecutor to a court, an Ombudsman or a human rights commission.

Deliberative accountability among a group of people who meet face to face has its own pathologies - like groupthink (Janis, 1971). So we actually need a prudent mix of deliberative accountability within the circle and accountability from a separate source of power that is external to the circle. What Figure 1 argues is that we can still get that mix of internal deliberative accountability and external accountability to separated powers by organizing circles of deliberative accountability in a circle. The republican ideal is for all nodes of governance in a separation of powers to become more deliberative in their decisionmaking. This means a more deliberative parliament (Uhr, 1998), more deliberative courts (Sunstein, 1988), more deliberative regulatory agencies (Braithwaite, 2002), and so on. So we end up with a checking and balancing circle of deliberative circles.

Braithwaite and Parker (1999) have argued that restorative justice circles should be checked by the rule of law and the rule of law should be permeable to messages bubbling up from the rule of the people as articulated in restorative justice circles. This is Roche's (2003) conclusion as well – deliberative accountability and external accountability have different effects;⁴ while deliberative accountability is cheaper and more contextually grounded, and can therefore do most of the hard work of practical accountability, external accountability is also needed, particularly because of the superior linkage it can offer to a rule of laws enacted by democratically elected governments.

⁴ For example, Roche (2003: 216) finds that horizontal accountability more often leads to interventions to “prevent overly harsh outcomes”, while vertical accountability more often leads to interventions to prevent outcomes that are “too lenient”. Put another way, horizontal accountability works best for checking upper limits on punishment, vertical accountability for checking lower limits on punishment.

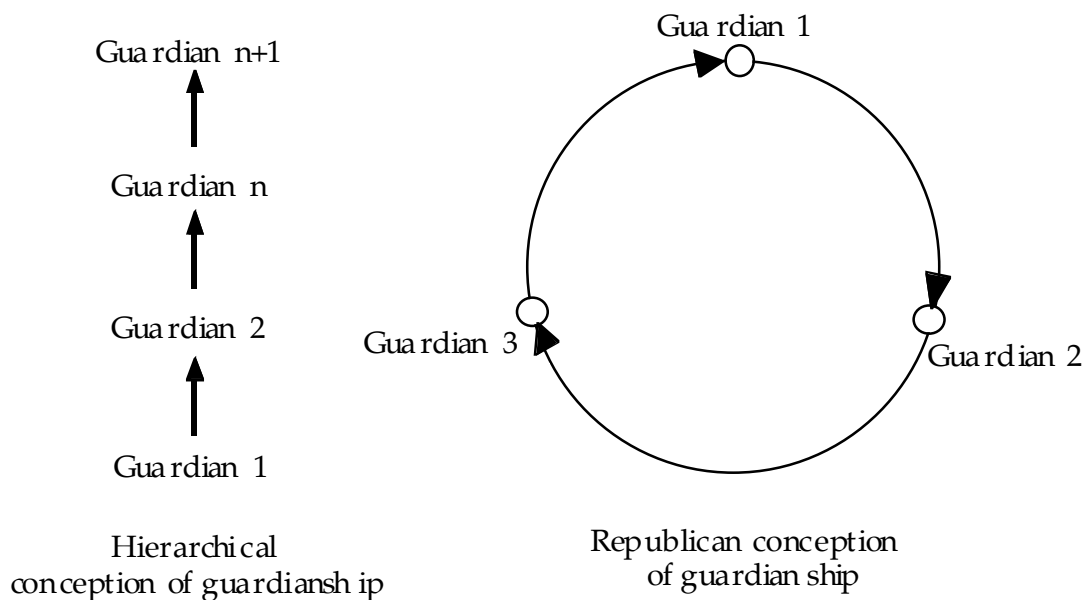


Figure 1: Formal models of hierarchical fiduciary and republican conceptions of accountability

Active and Passive Responsibility

Braithwaite and Roche (2000) argue that restorative responsibility might be conceived as that form of responsibility most likely to promote restoration – of victims, offenders and communities. Given that framework, following (Bovens, 1998), they find a useful distinction between active and passive responsibility. Then they show that the active-passive responsibility distinction usefully maps onto distinctions between active and passive deterrence, active and passive rehabilitation and active versus passive incapacitation. They argue that the active versions of deterrence, rehabilitation and incapacitation are likely to be more effective than their passive versions. While these consequentialist considerations are important in motivating a restorative justice jurisprudence as a jurisprudence of active responsibility, this part of the argument will not concern us here except in one respect.

This respect is that an important part of a mechanism by which active responsibility delivers active deterrence, active rehabilitation and active incapacitation is that the circle from which accounts are requested is widened. In our development of these ideas with business regulatory agencies in Australia, we would ask for a conference with those causally responsible for an offence within the company. That conference would often break down when these corporate actors refused to accept responsibility, saying in effect, “see you in court”. Instead of proceeding to litigation, however, what we would do was widen the circle. The regulator would ask for another conference, inviting the boss of those directly responsible to join the circle. Inviting the boss to give an account would sometimes backfire even more badly because the boss was an even tougher nut than her subordinates. Then our idea was to widen the circle even further. In one case using this approach an Australian regulator widened the circle right up to the Chairman of the Board (Braithwaite 2002: 110). The Chairman was a soft target who could be moved by shame about the corporate offence and by a simple appeal to his sense of moral responsibility. He fired his CEO (not very restorative!) and participated in an agreement where generous compensation was paid to victims and impressive internal compliance measures were put in place to prevent recurrence of the offence. The idea is that we can keep widening the circle of accountability; at each step there are extra people with extra capacities to prevent recurrence of injustice and to right the wrongs of past injustice. With active deterrence, we keep widening the circle beyond hard targets who are not deterrable until we reach a soft target who can be deterred by shame. With active rehabilitation of a homeless young offender, we widen

the circle beyond a nuclear family who will not have him back until we find a more distant relative or family friend, perhaps in another city, who will take him into their home.

In Figure 1 we ended up with a checking and balancing circle of deliberative circles. Now we have added the further idea that the circles should be iteratively widened to remedy responsibility and accountability failures. So the ideal is a circle of widening circles of deliberative accountability (Figure 2):

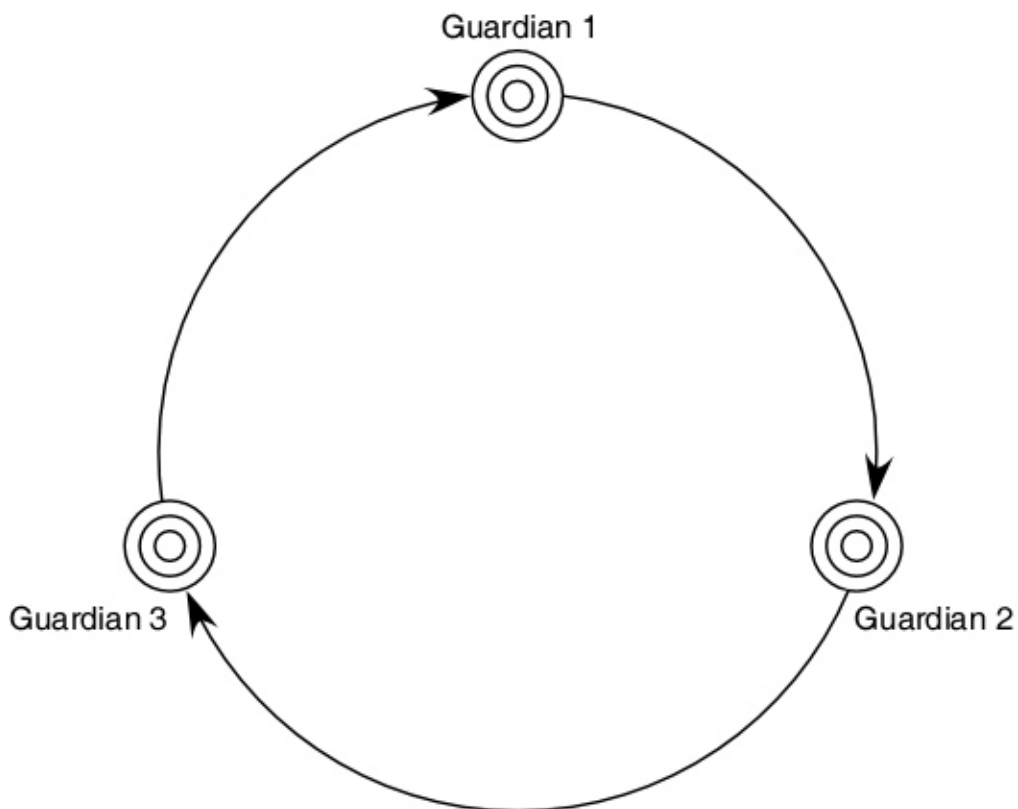


Figure 2: The ideal of a circle of checking and balancing separated powers, each of which is potentially a widening circle

Mark Bovens (1998: 27) first distinguished active from passive responsibility. Elaborating Bovens' conception somewhat, passive responsibility is something we hold wrongdoers to; we hold someone responsible for something they did in the past. Active responsibility means *taking* responsibility for putting something right into the future. One can be actively responsible for righting a wrong in the future without being causally responsible for the wrong in the past. Family members of an offender might offer to work with the offender to help repair the damage a victim of crime has suffered, for example. Restorative justice is partly about community building by encouraging citizens who are not offenders to assist in righting wrongs that offenders have caused. One virtue of the active responsibility of an offender's loved ones is that it nurtures active responsibility on the part of the offender. Restorative justice is about creating a space where offenders are most likely to take responsibility. Conventional western criminal justice is about creating spaces where offenders will be held responsible in proportion to their culpability.

Building on Fisse's (1983) notion that the most important kind of criminal fault is reactive fault – how praiseworthy or blameworthy is an offender's reaction to the offence - Braithwaite and Roche (2000) argue that if offenders take active responsibility for apology, repairing the harm and repairing themselves, then they have acquitted their reactive fault. In conventional criminal law jurisprudence, passive responsibility is acquitted by punishment in proportion to that fault. Under restorative jurisprudence passive responsibility is acquitted by active responsibility as a reaction to the crime. It follows that there remains a role for passive responsibility in restorative justice – both in determining that there is fault that must be

acquitted reactively and in determining fault that cannot be let stand if there is a failure to acquit it through active responsibility. In other words, we need passive responsibility to decide that there is an offender who is causally responsible for a criminal offence. And we need the jurisprudence of passive responsibility to guide what is the maximum punishment we should be able to impose when active responsibility is spurned.

But restorative justice is about a major shift in the balance of criminal jurisprudence from passive to active responsibility. This is connected to the restorative justice notion that because crime hurts, justice should heal. What follows from this is greater importance for how just we are in the way we heal, as against the more traditional concern of how just we are in the way we hurt. Justice in the way we hurt others is of course an important concern for restorativists, but the theory articulated here is that it only arises in cases where we have failed to achieve justice in the way we heal.

Another way of summarizing all this is that restorative justice has a theory of responsibility that is more demanding than conventional western justice; it demands active responsibility. But it also demands passive responsibility as both a precondition for restorative justice and as a backstop when active responsibility is not proffered. Moreover, the processes of nurturing active responsibility and allocating passive responsibility are democratically rich compared to conventional justice processes. They depend for their meaning on opportunities for all the stakeholders in an injustice to participate in defining what responsibility for that injustice should mean. Restorative justice conferences are sharply distinguished from criminal trials by the fact

that the major stakeholders – the victim and the offender – have an absolute veto over an outcome that they feel allocates responsibility inappropriately.

Not only is democratic participation necessary to give all stakeholders the opportunity to step forward to voice a willingness to take active responsibility, recursively the taking of active responsibility nurtures future democratic participation. Restorative justice is constitutive of actively responsible democratic citizens. We are not born democratic; we learn to be democratic in the ways for example that are required to make the kind of participatory accountability discussed in Sasha Courville's Chapter work. This is why restorative justice activists place so much emphasis on restorative justice programs in schools (Morrison, forthcoming) and why these are growing faster in the United States than the many hundreds of restorative criminal justice programs that now exist in all states (Bazemore and Schiff, 2005).

Responsibility and Accountability

Responsibility and accountability are related concepts (see Cane, 2002: 32-34). If you are responsible for something, you are liable for giving more than just an account of what you have done in respect of it; you are also liable for acting to fulfill that responsibility. If you acquit the responsibility badly, you are liable for blame; if well, for credit or praise. It is only for some kinds of responsibility that we are publicly accountable. My son is responsible for keeping his bedroom tidy, but there is no requirement for him to be accountable for this in any public way. So responsibility is an obligation to do some right thing. Responsibility is a realm of (private or public) action; accountability is a realm of public justification.

Obversely, we can be required to provide a public account of certain conduct without being responsible for that conduct. This is the role of the auditor with a company's books: to report whether they give a true and fair account of the company's finances. But the auditor is not responsible for the financial performance of the company or even for the state of its financial records; she is responsible only for giving a public account of them. In drawing the distinction this way, I am going with the narrow classical conception of accountability as simply a requirement of giving a public account. This classical conception originates with the ancient Greeks and is elaborated with the Roman and later Northern Italian development of the idea of audit (Day and Klein, 1987; Mulgan, 1997, 2000; Roche, 2003).

We can conceive of restorative justice as a process that, by virtue of its dual integration into horizontal processes of community deliberation and external processes of accountability to courts (Roche, 2003), enriches democratic thinking about institutional relationships between responsibility and accountability. In the first section of this paper we saw that restorative justice is very much a participatory process for fostering responsibility, particularly on the part of offenders but not only on their part. The public accountability dimensions of restorative justice are mostly, though not entirely, about rendering an account of whether the responsibility that has been taken is just. Accountability happens deliberatively when an offender gives an account of what he proposes to do to right a wrong. Accountability is sharpened when the discussion in a restorative justice circle leads to the conclusion that what the offender has proposed is not enough to acquit her responsibility; further deliberation is required and a fresh account must be

provided of the responsibility to be taken. Accountability happens externally when a court reads the account of a restorative justice conference and decides that it should overrule the conference outcome.⁵

Figures 3 and 4 represent what I am conceiving here as the key dimension of accountability for restorative justice, the rendering of an account that acceptable responsibility for an injustice has been taken. Figure 3 represents the idea that restorative justice should mean that we never give up on accomplishing active responsibility and assuring accountability for that accomplishment. The figure means that our preference is for restorative justice, devolved to the community, creating a space where: (a) active responsibility is taken, (b) stakeholder citizens in the conference accept the account given of that responsibility (by for example signing a conference action plan at the end of a discussion or later perhaps by holding a “celebration circle” as a ritual recognition that the plan has been completed and responsibility acquitted), and (c) where the state accepts this devolved deliberative accountability (by for example a court ratifying a conference agreement, a prosecutor monitoring the agreement and deciding that the conference has accomplished sufficient accountability for there to be no need to take the case to court).

If insufficient responsibility is taken, Figure 3 suggests it is best to try again with a restorative justice process devolved to the community. Community stakeholders themselves do best when they have this preference – that is, when their first response to a failure to take sufficient responsibility is to

⁵ Or, as in the Australian insurance regulation cases of the early 1990s (Braithwaite, 2002: 22-24), the legislature can react to what they learn about defects in the law from the outcomes of the restorative justice processes and enact new laws in response.

adjourn the restorative justice circle and reconvene when the offender has had more time to think about why his account is not being accepted and perhaps with additional members who can bring fresh perspectives into the circle. But of course it is the free choice of stakeholders to spurn restorative justice and prefer the justice of the courts. Similarly, the state does best when its presumption is that the best response to an initial failure to accomplish sufficient responsibility is to try again with restorative justice devolved to the community. Moreover, Figure 3 suggests that the best response of both community stakeholders and the state when restorative justice fails a second and a third time is likely to continue to be to try again with restorative justice. We tolerate courts failing at the twentieth and thirtieth appearances of repeat offenders; we should tolerate restorative justice failing on a second and third appearance, and beyond. But ultimately the contextual wisdom of the restorative justice circle in a particular case may be that continued restorative justice failure is likely and the case is best handed on to the state to hold the offender passively responsible. But even when this has happened, there should remain a hope that once punishment has been imposed, the offender might ultimately come to feel remorse, apologise to the victim and the victim might ultimately be ready to accept the apology and even offer forgiveness.

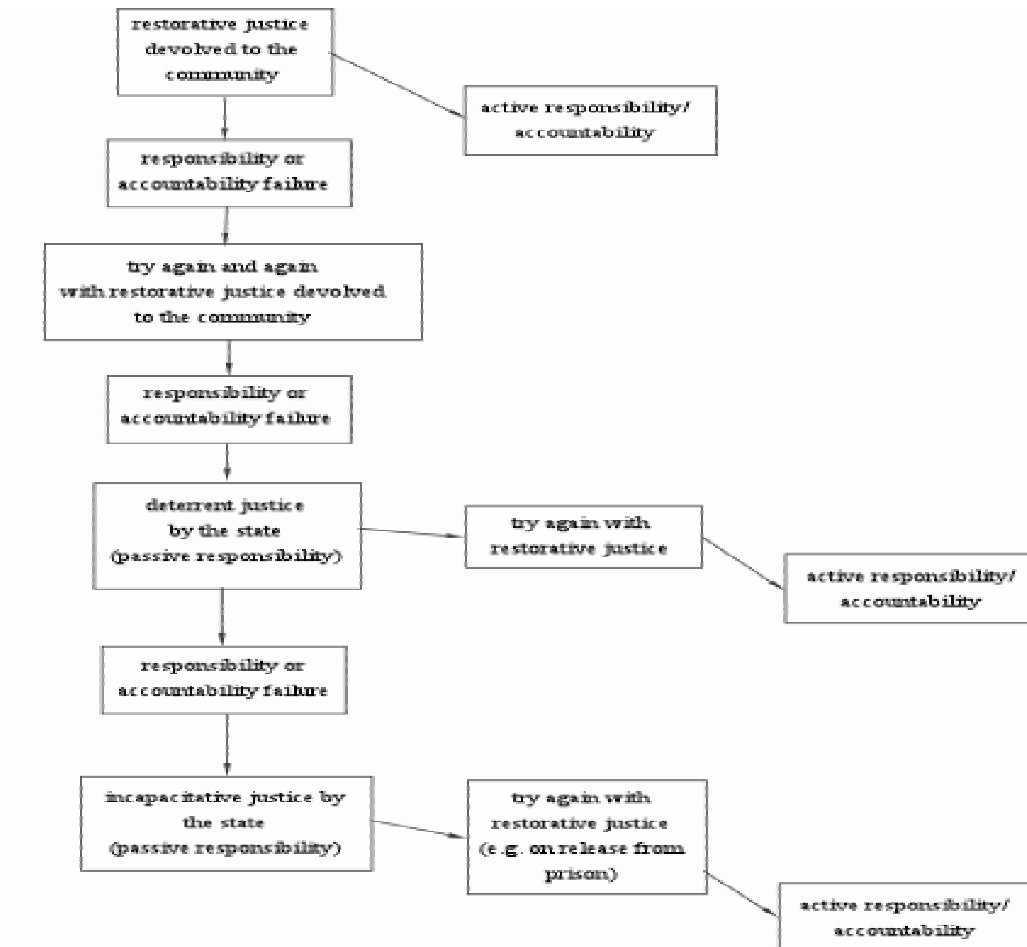


Figure 3: Restorative Justice Means Never Giving Up on Responsibility and Accountability

When deterrent punishment fails, when remorse is eschewed, victims are disdained, or reoffending occurs, it may ultimately be necessary to impose an incapacitative punishment – one that actually removes the capacity of the offender to commit this kind of offence again – by locking her up, for example, or disqualifying her from acting as a company director. But when that period of disqualification or imprisonment ends, the ideal is that there would be another opportunity for a restorative justice process in which active responsibility is taken, apology rendered, victims assured that they will be safe when the offender is released, and so on.

Such a procedural commitment to never giving up on restorative justice would be expensive. It is an ideal of an exhaustive practice of healing through accountability that can never be perfectly achieved, yet is a yardstick against which we measure different degrees of accountability for the justice of the responsibility that is taken.

Figure 4 represents schematically what happens when insufficient responsibility for an injustice is accepted in a restorative justice process. This can arise through a downright refusal of an alleged offender to participate in a restorative justice process or a denial of any responsibility in such a process. Or it can occur because the citizens in the conference do not accept the offender's account of the responsibility she proposes to accept. They think it is not a sufficient response to the degree of wrongdoing. Either way, the state must then step in and signal a willingness to hold people responsible for an injustice. This state actor might be a regulatory authority like the police, a factory inspectorate, a prosecutor, or it might be a court. When the state takes responsibility for repairing the responsibility failure

that has occurred in community justice, under the restorative justice ideal it still hopes that stakeholders will take active responsibility back from the state. When stakeholders, particularly offenders, refuse to do this, the state escalates its response, at each stage of escalation hoping citizens will still not find it too late to take active responsibility for repairing the harm. That escalation can be from police caution on the street to a more formal caution at the police station (or by taking the offender home to their family), then referral to a prosecutor, then a court hearing and ultimately incarceration. As in Figure 3, the message of Figure 4 is that there is no stage when the state gives up on the hope of accountability for active responsibility.

There are other important dimensions of accountability beyond accountability for sufficient responsibility. The state also takes responsibility for holding restorative justice processes accountable for respecting human rights of victims and offenders, for procedural safeguards, for ensuring all stakeholders are listened to respectfully, for the integrity of the financial accounts of the program and a large variety of accountabilities beyond those for the justice of responsibility attributions. In addition, non-state actors, such as human rights NGOs, womens' shelters, youth advocates and Indigenous community organizations, can be more important interveners than states in these responsibility-accountability interventions (see Braithwaite, 2002). Indeed, one of the most effective ways of deepening the furrows of democratic responsibility for justice is to resource and empower organizations in civil society to improve on the state's capabilities to assure accountability for justice failures.

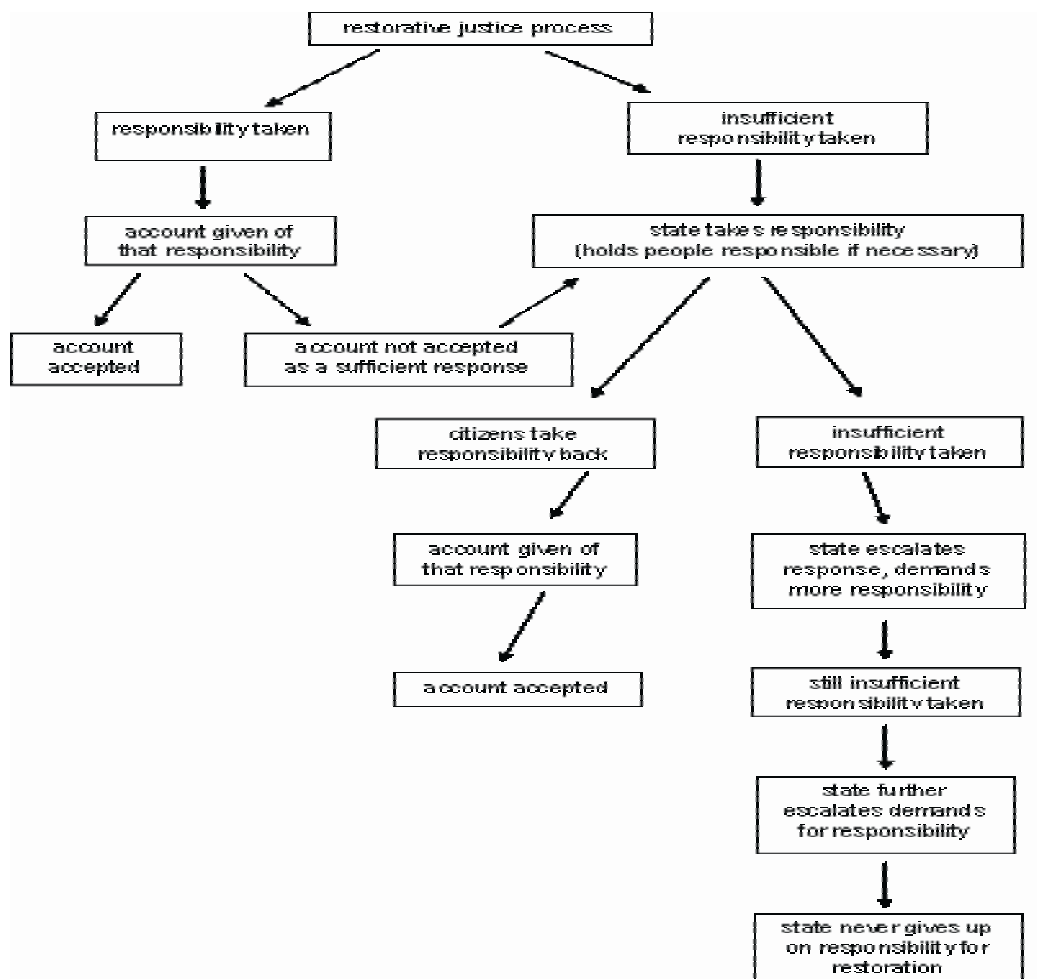


Figure 4: The Dominant Dimensions of Responsibility and Accountability for a Restorative Justice Process

How Does Restorative Accountability Deepen Democracy?

The first respect in which the account of responsibility/accountability sketched here is claimed to deepen democracy is that there is a shift in the balance of how responsibility is exacted from responsibility as a coercive imposition of states upon citizens to responsibility as something autonomous citizens take, after listening to a democratic conversation about harms done, dues owed. Second, the principal stakeholders in a directly democratic conversation about an injustice – offenders and victims in the case of a crime – can directly veto any allocation of responsibility they view as unjust. Then, however, these principals must put the determination of responsibility into the hands of the less participatory but more authoritative process for allocating responsibility in the mainstream legal system. That is, principals should retain their right to adjudication of responsibility according to rules of law enacted by a democratic state. Without abandoning this old democratic right, restorative justice can mean a new right to the option of directly participatory democracy over responsibility allocations.

Third, even when the state takes over responsibility for responsibility allocations, there can be further opportunities at each stage of state intervention (police, prosecution, court, prison, parole etc) for citizens to take responsibility back into the realm of direct stakeholder democracy. State accountability is reconfigured recursively to enable responsibility to become something autonomous citizens freely choose as opposed to something the state enforces upon them. Every time accountability for justice obliges the state to “steal a conflict” (Christie, 1977) from the direct control of stakeholders in that conflict, it can also create a path where the stakeholders can take it back so long as they agree to provide an account to

the state of how they use the new opportunity to take responsibility for any serious injustice. This ideal is approximated in the whole of government approach to restorative justice of the Australian Capital Territory's *Crimes (Restorative Justice) Act 2004*.

Hence, on this theory, responsibility for injustice is thrown back to the realm of direct democracy, qualified by accountability to the state to ensure that fundamental principles of the rule of law are not fudged. Yet that state accountability is itself being qualified by an exhaustive commitment to keep throwing the game back from external to internal accountability in the circle of stakeholders. Every detour into top-down accountability in Figures 2 and 3 is itself detoured back to bottom-up accountability. The presumptive path is always direct stakeholder democracy (the justice of the people), but that path is always accountable to the justice of the law. Democracy is enriched when the justice of the people and the justice of the law each become more vulnerable to the other (Braithwaite and Parker, 1999). Democracy can be enriched by the set of preferences for responsibility being active rather than passive, bottom-up rather than top-down, accountable both deliberatively and externally rather than just deliberatively among stakeholders or just externally to a state authority. Together these preferences might make restorative justice a more deeply democratic practice of justice both in terms of citizen participation and in terms of accountability to a rule of law that is an accomplishment of the people. Not only does it raise the possibility of a practice that takes democratic accountability more seriously than does a rule of law we are held to by grey men in white wigs. It also invokes the possibility of taking responsibility more seriously by never settling for passive responsibility, always struggling to turn passive back into active

responsibility owned by wrongdoers and other stakeholders. To settle for passive responsibility, cursed by the criminal as a rope breaks his neck, is to settle for a muted responsibility and a muted democratic conversation about justice.

The final chapter of *Restorative Justice and Responsive Regulation* (Braithwaite, 2002) argues that it is an institutional possibility to redesign governance to grant citizens universal access to both restorative justice and the justice of the courts when there are reasonable grounds for believing that they have suffered a serious injustice. A key to rendering this seemingly implausible political aspiration plausible is Christine Parker's (1999) idea of a regulatory institution that requires all private and public organizations above a certain size to have an access to justice plan and to continuously improve access to justice under that plan. If the kind of consequences Parker proposes for failure to continuously improve access to justice were in place, larger organizations would invest in injustice prevention and in restorative justice not only inside their own organizations but in their interaction with individuals and smaller organizations upstream and downstream. The core idea is that strategic regulation of access to justice would cause the organizational sector of the economy, which it is argued is directly or indirectly implicated in the majority of serious injustices in a complex society, to internalise the costs of injustice prevention and of healing the hurts of their injustices. Universal access of citizens to both restorative justice and to the justice of the courts for any serious injustice would then become fiscally possible. Braithwaite (2002: Chapters 3,8) argues that because there is overwhelming research evidence that citizens prefer restorative justice to the justice of the courts, faced with universal

access to both kinds of justice, people would overwhelmingly choose restorative justice. Since restorative justice is mostly (though not invariably) more immediate and less complex, to the extent that citizens do opt for it in preference to the delay and complexity of litigation, resources are freed up to fund legal aid in the cases where a universal right to access to the courts must be honoured.

Readers may conclude that the possibility of a democracy that insists on accountability for universal dual access to deliberative accountability and external accountability to state justice is wild utopianism. It is not the purpose of this essay to provide the evidence or arguments to dissuade this conclusion. But those who reach it might be persuaded by the essay of the virtues of integrating deliberative accountability and accountability to the rule of law. If so, they might join in demands for incremental reform to deliver both more access to restorative justice for those who want it and more legal aid to improve access to the courts for those who want it. And they might support R and D on whether restorative justice, especially in schools, actually helps young citizens learn to be democratic (Morrison, forthcoming). Only we dreamers will believe these might be steps along the path to a project of larger democratic ambition.

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