# Chapter 8

# In search of restorative jurisprudence

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## 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 cities where Compstat computer targeting of crime hotspots for special police surveillance both seems able to reduce serious crimes like gun homicides and disproportionately targets black people (Sherman 1998).

Here I think there are lessons for restorative justice jurisprudence in the contrast between the Boston and New York police targeting of recent years, both of which make some plausible claims for reducing crime through improved targeting (Berrien and Winship 2000). In early 1999, both law enforcement officials and community members became greatly concerned at the shocking number of violent incidents in Boston's Cape Verdean community. The police believed they knew who were the gangs behind the violence. They believed they 'had the right guys' each of whom they could take out with several charges for offences not necessarily having anything to do with the violence (Berrien and Winship 2000: 30). They also wanted to do an Immigration and Naturalization Service sweep,





with the threat of deportation for certain youths, unless the gang violence threatening the community stopped. Such an aggressive targeted swoop on a non-white community was obviously controversial and open to the interpretation of being racist. But what the lead police officer did was consult with both city-wide leaders of colour who had been critical of the police in the past for racist enforcement and consulted with the local Cape Verdean community. The police would not go ahead with this aggressive targeting unless it would be well received by the affected community. In the event, locals did seem so fed up with the violence that they wanted decisive policing. The targeting was of course still controversial, but it occurred with considerable local buy-in and it did not come as a shock to the local community when these young people were targeted. As far as I understand the case, limits and fundamental human rights were not breached. People were charged with offences they had actually committed. What is controversial is that many in white communities might have been targeted for the same kinds of offences. There are two relevant differences: the race difference and the fact that such a swoop in some other community that did not have the level of violence of the Cape Verdean community would not have picked up guns, would not have given a signal that might end gang violence. Police paralysis in the face of the moral dilemma seems a bad option. But a New York style police pounce aimed at reducing gun violence is also an inferior option to the Boston path of targeting combined with community consultation. While 'New York has gained national attention for dramatic reductions in violence … Boston has found a way to achieve dramatic reductions in violent crime while making equally strong efforts to build partnerships with the community' (Berrien and Winship 2000: 32). A better option still than the Boston approach might involve consultation with the community followed by offering the targeted youths an option of a restorative community justice process as an alternative to incarceration (see Braithwaite 2002a: Chapter 2).

While I doubt there will ever be a settled restorative justice view on proportionality, my submission would be to abandon proportionality in favour of a commitment to limits and to honouring rights. Then under those constraints we might rely heavily on richly deliberated consent when the interventions that seem necessary to secure public safety involve selective enforcement against some but not others.

## The jurisprudence of responsibility

Declan Roche and I have argued that restorative justice involves a shift

towards an active conception of responsibility, while still finding a more limited place for passive responsibility than is standard in criminal jurisprudence (Braithwaite and Roche 2000). While passive responsibility means an offender being held responsible for a wrong he has committed in the past, active responsibility is a virtue, the virtue of taking responsibility for repairing the harm that has been done, the relationships that have been damaged. Restorative justice is about creating spaces where not only offenders, but other concerned citizens as well, will find it safe to take active responsibility for righting the wrong.

With respect to offenders, Roche and I found appeal in Fisse's (1983) concept of reactive fault. This means that even though an individual can reasonably be held passively responsible for a crime, if she takes active responsibility for righting the wrong, she can acquit that responsibility. She does not need to be punished for it; indeed in many contexts it would be wrong to do so.

In recent years, I have noticed on visits to women's prisons, not only in my own country, a new feminist consciousness that sees posters in public areas of the prison that point to the injustice of the revelation in research studies that a majority of the inmates of womens' prisons have been victims of sexual abuse in their past. When I read those posters their feminist polemic is always persuasive to me: 'Yes', I think, 'that is the most profound injustice about most of these women being in this place.' I particularly thought that recently when I met Yvonne Johnson (see Wiebe and Johnson 1998), a Cree woman raped as a child by a number of men, in prison for the brutal murder of a man she believed had sexually molested her children. Then I would quickly move to the thought that it would nevertheless be dangerous to excuse terrible crimes on these grounds.

Shadd Maruna's (2001) wonderful book, *Making Good: How Ex-Convicts Reform and Rebuild their Lives* is relevant here. It showed that serious Liverpool offenders who went straight had to find a new way of making sense of their lives. They had to restory their life histories. They defined a new ethical identity for themselves that meant that they were able to say, looking back at their former criminal selves, that they were 'not like that any more' (Maruna 2001: 7). His persistent reoffender sample, in contrast, were locked into 'condemnation scripts' whereby they saw themselves as irrevocably condemned to their criminal self-story.

This suggests a restorative justice that is about 'rebiographing', restorative storytelling that redefines an ethical conception of the self. Garfinkel (1956: 421–2) saw what was at issue in 'making good': 'the former identity stands as accidental; the new identity is the basic reality. What he is now is what, after all, he was all along.' So, Maruna found systematically that desisters from crime reverted to an unspoiled identity.





Desisters had restoried themselves to believe that their formerly criminal self 'wasn't me'. The self that did it was in William James' terms, not the I (the self-as-subject, who acts) nor the Me (the self-as-object, that is acted upon), but what Petrunik and Shearing (1988) called the It, an alien source of action (Maruna 2001: 93). Restorative justice might learn from this research how to help wrongdoers write their It out of the story of their true ethical identity. Maruna (2001: 13) also concluded that 'redemption rituals' as communal processes were important in this sense-making because desisting offenders often narrated the way their deviance had been decertified by important others such as family members or judges – the parent or policeman who said Johnny was now his old self. Howard Zehr (2002: 10) makes the point that whether we have victimized or been victimized, we need social support in the journey 'to re-narrate our stories so that they are no longer just about shame and humiliation but ultimately about dignity and triumph.'

Maruna (2001: 148) commends to us the Jesse Jackson slogan: 'You are not responsible for being down, but you are responsible for getting up.' In the all-too-common cases of children in poverty who have been physically or sexually abused, they do frequently feel that they are not responsible, that their life circumstances have condemned them to regular encounters with the criminal justice system. While there is moral peril in allowing the law to accept poverty as an excuse, an attraction of restorative justice is that it creates a space where it can be accepted as just for such victimized offenders to believe: 'I am one of the victims in this room. While I am not responsible for the abused life that led me into a life of crime on the streets, I am responsible for getting out of it and I am also responsible for helping this victim who has been hurt by my act.' Maruna (2001) found empirically that desisters from crime moved from 'contamination scripts' to 'redemption scripts' through just this kind of refusal to take responsibility for being down while accepting responsibility for getting up. In short, by accepting a jurisprudence of active responsibility, it may be that we can respond more compassionately to the injustices offenders have suffered while increasing community safety, instead of threatening community safety in the way implied by our moral hazard intuitions against allowing poverty as an excuse. Hence, when a woman like Yvonne Johnson has good reason for thinking that she has been the most profound victim of injustice in the events swirling around her, yet has remorse for her crimes, wants to do the best she can to right the wrongs of her past, help others to avoid that path themselves, why not let her keep the interpretation that she was not really responsible for her terrible circumstances, so long as she takes responsibility for getting out of them and for doing what she can to heal those she has hurt? Why not say, 'because you have acquitted your

fault reactively, because you are not a danger but a blessing to others, go in peace.' Because you have taken active responsibility for making good, you will no longer be held responsible for any debt to the community. This links to the core restorative intuition that because crime hurts, justice should heal. And punishments that obstruct healing by insisting on adding more hurt to the world are not justice.

## Contextual justice, not consistent justice

Restorative processes put the problem in the centre of the circle, not the person (Melton 1995). The right punishment of the person according to some retributive theory will almost always be the wrong solution to the problem. By wrong I mean less just. Both restorative justice and responsive regulation (Ayres and Braithwaite 1992) opt for contextual rather than consistent justice. With restorative justice, it is the collective wisdom of the stakeholders in the circle that decides what is the agreement that is just in all the circumstances, not perhaps the ideal agreement in the view of any one person in the circle, but one that all in the circle can sign off on as contextually just. That agreement that seems contextually just to all of them may or may not include punishment, compensation, apology, community work, rehabilitation or other measures to prevent recurrence. Because punishment, apology and measures to dissuade others from taking the same path are not commensurable in the terms of retributive theory, asking if the outcomes are consistent across a large number of cases makes little sense.

Similarly, responsive regulation is contextual justice. With responsive regulation, the regulator moves up a regulatory pyramid in the direction of progressively more onorous state interventions until there is a response to improve compliance with the law, compensate victims of wrongdoing, put better compliance systems in place, and so on (see the example of a responsive regulatory pyramid that integrates restorative justice with deterrence and incapacitation in Figure 8.1).[2] So restorative justice and responsive regulation share the notion that state response can become contextually more punitive if offenders are not responsive to appeals to take their obligations more seriously. Reactive fault again.

Retributive intuitions are that such contextual justice on both fronts is inferior to the consistent justice of equal punishment for equal wrongs. Rather restorative justice, as I have conceived it here, involves unequal punishment in response to unequal reactions (to unequal active responsibility). With restorative justice, a particular concern from the consistent punishment perspective is that whether you get a lighter or a





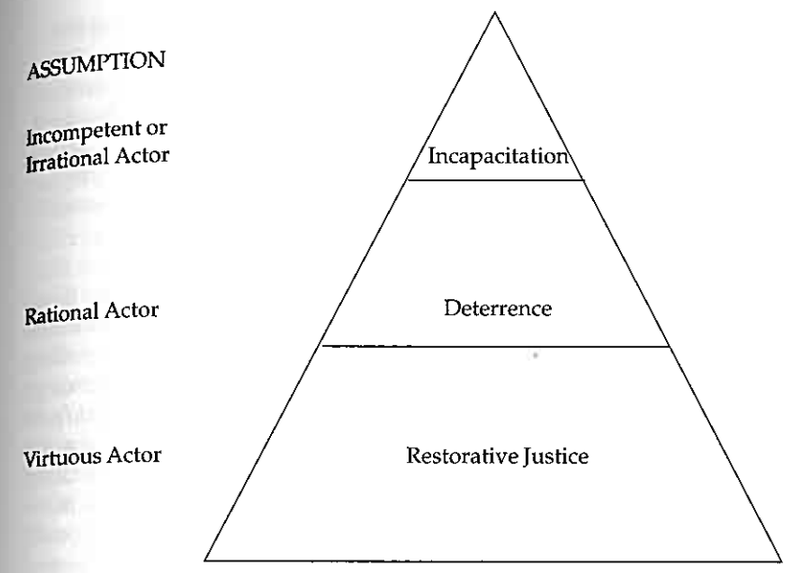


**Figure 8.1.** Toward an integration of restorative, deterrent and incapacitative justice.

harsher punishment will depend on how punitive or forgiving victims and others in the circle are. A rich victim might not need full compensation as desperately as a poor one. But that is part of the point for the restorativist. If the poor victim is in more desperate trouble then she has a greater need and it would be a greater injustice to fail to fully respond to it.[3] For most of the great philosophers of the past, and for contemporarily influential ones such as Dworkin (1986) as well, fundamental to genuine justice is equal concern and equal respect for the needs of all of those hurt by an injustice. It follows that privileging equal punishment for offenders narrows us to concern for only one type of justice affecting one type of actor. Philosophers who take the equal application of rules very seriously in a wide range of contexts – from Cass Sunstein to Fred Schauer – are also clear that if we could perfect equal concern for all affected by an injustice we would not do it by enforcement of simple rules like equal punishment for equal wrongs. As Sunstein puts it; 'If human frailties and institutional needs are put to one side, particularized judgments, based on the relevant features of the single case, represent the highest form of justice' (Sunstein 1996: 135). And indeed the presumptive positivist Schauer argues even more emphatically:

> When we entrench a generalization, therefore, we do not further the aim of treating like cases alike and unalike cases differently. On the contrary, it is particularism that recognizes relevant unlikeness, drawing all the distinctions some substantive justification indicates ought to be drawn. And it is particularistic rather than rule-based decision-making that recognizes all relevant similarities, thereby ensuring that substantively similar cases will in fact be treated similarly (Schauer 1991: 136–137).

Schauer's case for rules is arguments from reliance, efficiency, from stability and about enabling a proper allocation of power. The restorativist can argue that reliance that punishment will be prevented from exceeding upper limits that track the seriousness of an offence is quite enough reliance. Who wants the reliance of knowing that you are prevented from getting less than this, or much less? Reliance makes a good case for the existence of criminal law with upper limits, as opposed to open-textured evaluation of wrongdoing unconstrained by rules. But it does not make much of a case for lower limits or proportionality all the way down. I could work through a restorativist spin on all of Schauer's reasons for rules and why in criminal law they do not make a case for equal punishment for equal wrongs. But this would distract me from my core point, which is that equal punishment for equal wrongs is a travesty of equal justice.

Restorative justice has no easy escape from the horns of the dilemma that equal justice for victims is incompatible with equal justice for offenders. First, because it is a trilemma; restorativists are enjoined also to be concerned with justice for the community. So of course restorativists must reject a radical vision of victim empowerment that says that any result the victim wants she should get so long as it does not breach upper constraints on punishment. Restorativists must abandon both equal punishment for offenders and equal justice (compensation, empowerment, etc.) for victims as goals and seek to craft a superior fidelity to the goal of equal concern and respect for all those affected by the crime. The restorative justice circle is an imperfect vehicle for institutionalizing that aspiration. We can improve it without ever perfecting it. But I would argue that the aspiration is right.

The restorative circle heads down the path of the holistic consideration of all the injustices that matter in the particular case (Zehr 1995; Van Ness and Strong 1997; Luna 2002), as suggested in the quotation from Schauer (1991), but in a way constrained by limits on punishments, rights and rules that define what is a crime and what is not. We might be stumbling as we feel our way, but it does seem a better path than the narrow road of proportional punishment.





While we should not seek to guarantee offenders equal punishment for equal wrongs, the law can and should assure citizens that they will never be punished beyond upper limits. While victims cannot be guaranteed their wishes, the law should assure them of a right to put their views in their own voice. It should also guarantee a minimum level of victim support when they are physically or emotionally traumatized by a crime. This falls far short of an equal right of victims for full empowerment and full compensation. But the minimum guarantees I propose on the offender side and the victim side put some limits on how much inequality we can produce as we stumble down the path that pursues holistic justice. We are constrained that however we try to implement the ideal of equal concern and respect for all affected, we must assure that certain minimum guarantees are always delivered to certain key players. This puts limits on the inequality of the justice any one person can suffer, just as it enjoins us to eschew the error of single-minded pursuit of equality for the one that produces inequality for others.

The difficult choices were well illustrated by the Clotworthy case in New Zealand (see the Box below). Clotworthy is a paradigm case, albeit an extreme one, because, as we saw earlier, the evidence is that when courts overrule restorative justice conferences it is overwhelmingly to increase punishment, to trump the mercy victims have agreed to, and is rarely to reduce punitive excess demanded by victims. In my view, it was Justice Thorburn who decided the case correctly. But the more important point to emphasize is that the retributive presumption here tends to be empirically wrong. That presumption is that the problem is that victims will demand more punishment than the courts deem proportionate, whereas in fact the 'problem' is that they more often demand less than the courts deem proportionate. This is another instance of where the retributive philosophers have been led to unbalanced, decontextualized analyses by adopting a perspective which grows out of the less likely rather than the more likely empirically arising ethical dilemma.

CLOTWORTHY

Mr. Clotworthy inflicted six stab wounds, which collapsed a lung and diaphragm, upon an attempted robbery victim. Justice Thorburn of the Auckland District Court imposed a 2 year prison sentence, which was suspended, a compensation order of $15,000 to fund cosmetic surgery for an 'embarrassing scar' and 200 hours of community work. These had been agreed at a restorative conference organized by Justice Alternatives. The Judge found a basis for restorative justice in New Zealand law and placed weight on the

wish of the victim for financial support for the cosmetic surgery and emotional support to end through forgiveness 'a festering agenda of vengeance or retribution in his heart against the prisoner'. The Court of Appeal allowed the victim to address it, whereupon the victim 'reiterated his previous stance, emphasising his wish to obtain funds for the necessary cosmetic surgery and his view that imprisonment would achieve nothing either for Mr. Clotworthy or for himself' (p.12). The victory for restorative justice was that 'substantial weight' was given by the court to the victim's belief that expiation had been agreed; their honours accepted that restorative justice had an important place in New Zealand sentencing law. The defeat was that greater weight was given to the empirical supposition that a custodial sentence would help 'deter others from such serious offending' (p.12). The suspending of the two year custodial sentence was quashed in favour of a sentence of four years and a $5,000 compensation order (which had already been lodged with the court); the community service and payment of the remaining compensation were also quashed. The victim got neither his act of grace nor the money for the cosmetic surgery. Subsequently, for reasons unknown, the victim committed suicide,

The Queen v Patrick Dale Clotworthy, Auckland District Court T. 971545, Court of Appeal of New Zealand, CA

## Principles of restorative justice

How do we evaluate the adequacy of this elusive contextual justice? How do we assess how satisfactorily active the active responsibility has been? Are there ever circumstances where we should dishonour rights and limits on punishment? I have written on these questions elsewhere, so I will not traverse them here except to say that Philip Pettit and I have argued that freedom as non-domination or dominion, republican freedom, is an attractive ultimate yardstick of the justice of any criminal justice practice (Braithwaite and Pettit 1990). More recently, Walgrave (2002) has worked through, in a manner I find congenial, the way dominion can guide the day to day practice of restorative justice.

What comes with civic republicanism is an approach to institutionalizing plurally deliberative justice under a rule of law and a separation of powers that accepts that citizens will often, indeed mostly, argue from a non-republican perspective. This is a great strength compared to retributivism or utilitarianism, which are stuck with the problem that if some judges are retributivists and some are utilitarians, the theory of the second best outcome is of a disastrous outcome. The republican argues for republican institutions and procedures without expecting that most people will manifest republican values within them. Sadly, sometimes they will be retributivists. But republicans must support giving voice to retributivists, indeed influence to them in deciding matters in which they are stakeholders. They can join hands with retributivists in defending upper limits, respectful communication and fundamental human rights as the only limits restorativists would want to place on the sway of retributive arguments. So when a restorativist is deeply disturbed by the threat to dominion in the agreement proposed in a restorative justice conference, what she should do, and all she should do, after failing to persuade others that the agreement is unjust, is argue that there is no consensus on the agreement and, this being so, the matter should be sent to court.





For most restorative justice advocates, freedom as non-domination is rather too abstract a philosophical concept to offer detailed practical guidance. I am grateful to Lode Walgrave for saying in his comments on this chapter that restoring freedom as non-domination is not for him too abstract, 'but a very clarifying principle'. While it is my hope people will come to this conclusion, I hope the following discussion will help them to do so, and even if they come to reject it, they might find the longer derived list of values useful for guiding evaluation research. At this early stage of the debate around restorative jurisprudence we must be wary against being prematurely prescriptive about the precise values we wish to maximize. Elsewhere, I have combined a set of still rather abstract restorative justice values into three groups. I will not defend the values again here (Braithwaite 2002b). Yes, they are vague, but if we are to pursue contextual justice wisely, both considerable openness and revisability of our values would be well advised, especially when the values debate is still so immature. The first group of values I submit for consideration by restorative jurisprudence are the values that take priority when there is any serious sanction or other infringement of freedom at risk. These are the fundamental procedural safeguards. In the context of liberty being threatened in any significant way, if no other values are realized, these must be.

*Priority list of values 1*

- Non-domination.
- Empowerment.

- Honouring legally specific upper limits on sanctions.
- Respectful listening.
- Equal concern for all stakeholders.
- Accountability, appealability.
- 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.

The second group of restorative justice values are values participants are empowered to ignore. Their being ignored is not reason for abandoning a restorative justice process. It might, however, be reason for asking the participants to agree to an adjournment so new participants might be brought in to give these values more chance of realization. While the second group are values that can be trumped by empowerment, they are values against which the success of restorative processes must be evaluated. Moreover they are values around which the restorativist is democratically active, seeking to persuade the community that these are decent values.

*Priority list of values 2*

- Restoration of human dignity.
- Restoration of property loss.
- Restoration of safety/injury.
- Restoration of damaged human relationships.
- Restoration of communities.
- Restoration of the environment.
- Emotional restoration.
- Restoration of freedom.
- Restoration of compassion or caring.
- Restoration of peace.
- Restoration of a sense of duty as a citizen.
- Provision of social support to develop human capabilities to the full.
- Prevention of future injustice.

The third list are values that restorativists do not actively encourage participants to manifest in restorative justice processes. To urge people to apologize or forgive is wrong and cruel. These are gifts that have no power





as gifts when they are demanded. Being on the third list does not mean they are less important values. It means they are values we promote simply by creating spaces where it is easy for people to manifest them.

*Priority list of values 3*

- Remorse over injustice.
- Apology.
- Censure of the act.
- Forgiveness of the person.
- Mercy.

List 3 are emergent values, list 2 maximizing values, list 1 constraining values. What follows from the above is that the evaluation of restorative justice should occur along many dimensions. Narrowly evaluating restorative justice in terms of whether it reduces crime (the preeminent utilitarian concern) or honours limits (the preeminent retributive concern), important as they are, are only two of 25 dimensions of evaluation considered important here. If 25 is too many, we can think of restorativists as concerned about securing freedom as non-domination through repair, transformation, empowerment with others, and limits on the exercise of power over others. From a civic republican perspective, the 25-value version, the four-value version and the one-value version (freedom as non-domination) are mutually compatible.

## Conclusion

The point of jurisprudence is to guide us in how we ought to evaluate the justice of disputing practices. That also implies an obligation to be empirically serious in measuring performance against these evaluation criteria. The restorative justice research community has a long way to go before it can marshall empirical evidence on all the outcomes discussed in this essay. Yet in a short time, a considerable portfolio of studies of variable quality has been assembled. The critics of restorative justice have not been as empirically serious. A contribution of this chapter has been to illustrate how this has rendered their analyses myopic. One illustration is that retributive critics launch their attacks from an assumption that the disturbing problem will be victims insisting on excessive punishment. Yet the empirical reality is of courts insisting on overruling restorative processes that include victims for not being excessive enough in their punishment. Hartian critics assume that punishment is justified because it

reduces crime, and that this is still true of punishing proportionately. Yet empirically punishment often increases crime in a way that makes it plausible that we can reduce crime by abandoning proportionality (while maintaining upper limits). The possibility of this empirical conjuncture is a blank page of the leading jurisprudential texts.

I have conceived the fundamental principles of restorative jurisprudence here as the republican dominion of citizens secured through repair, transformation, empowerment with others, and limits on the exercise of power over others. Repair is a very different value to punishment as hard treatment; repair does not have to hurt, though of course it often does. While restorativists share with retributivists a concern to limit abuse of power over others, restorative justice is distinguished from retributive justice by its obverse commitment to empowerment with others. Finally, our discussion of responsibility has illustrated how restorative justice aspires to transform citizens through deliberation into being democratically active. The active responsibility ideal is a republican transformative ideal or a positive liberty ideal. Retributive passive responsibility is an ideal of negative liberalism, of non-interference beyond holding citizens to legal obligations. In action, of course, retributivism is not liberal at all, but is the stuff of law and order conservatism at best, totalitarianism at worst. In action, restorative justice is a bit better than this, though it too will forever suffer a wide gap between normative ideal and political practice.

## Notes

1. A restorative theory of deterrence (see Braithwaite 2002a: Chapter 4) suggests that the Hartian assumptions are wrong. Empirically, there is now a lot of evidence that increasing punishment produces both increasing deterrence and increasing defiance (or reactance) effects (Sherman 1993; Brehm and Brehm 1981). Where the defiance effect is stronger than the deterrance effect, higher penalties increase crime. In their meta-analysis of correctional studies, Cullen and Gendreau (2000) found that the punitive severity of sentences actually had a small positive coefficient – more punishment, more reoffending.
2. The pyramid implies a willingness to abandon restorative justice in favour of more determinedly punitive justice primarily oriented to either deterrence or incapacitation when restorative justice fails (Braithwaite, 2002a: Ch. 2). It assumes that restorative justice will often fail and fail again and in such cases the safety of the community requires escalation to more punitive approaches. Even when this means imprisonment, however, restorative justice values should be given as much space as possible within the punitive justice institution. More importantly, however, responsive regulation means contextually responsive de-escalation back down the pyramid to restorative justice whenever punishment has succeeded in getting the safety concerns under control.
3. On the idea of a restorative justice philosophy based on responding to needs see Sullivan and Tifft (2001). See also the discussion in Braithwaite (2002a) of the compatibility between a concern with freedom as non-domination and the approach of Nussbaum (1995) of nurturing human capabilities.