

## Restorative Justice and De-Professionalization

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Restorative justice is a process where all the stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process. Empirically it happens to be the case that victims of crime are more concerned about emotional than material reparation (Strang, 2003). Lawyers are obviously not well placed to give an account of these emotional harms and how they might be healed. Hence, the practice of restorative justice has become a de-professionalizing project. Yet we will see that lawyers still have an important, though decentred, place in a restorative justice system.

Restorative justice comes in many forms. The most common in Europe and North America is victim-offender mediation. But the movement, inspired by New Zealand conferring and Canadian circle innovations, has been toward widening the circle to include supporters of the offender, supporters of the victim and sometimes other kinds of stakeholders from the community such as representatives of the school community when a crime occurs at school, or a congregation where it occurs within a church. So the first stage under most conferencing models is to approach the victim and offender to ask them not only to participate in a meeting with each other, but also to ask them to nominate who they would most like to have support them during the conference. When lawyers prepare for a court case, they invite people who, as witnesses, can inflict maximum *damage* on the other side; restorative justice facilitators empower stakeholders, both victims and offenders, to invite the people who will provide maximum *support* to their own side.

Conferrees discuss what happened and who was harmed by it. Sometimes the offender will be asked to summarize all the harms that have been mentioned by the participants. Then the conversation turns to what might be done to right the wrong. A plan with specific commitments on the part of the offender will be agreed upon and then this agreement will be signed by the victim, the offender and other stakeholders who have obligations under the agreement. Some programs have follow-up conferences to check implementation of the agreement and some even

hold a celebration circle when implementation is completed.

Citizens beyond the victim and the offender might also sign the agreement because they assume responsibility for some aspect of the agreement. For example, the victim of a violent crime might ask that the offender attend an anger management program. A supporter of the offender says that after a previous offense the judge ordered attendance at an anger management program. The offender attended a couple of times and then just stopped bothering to attend. An uncle chimes in and offers to pick the offender up every Tuesday evening at 7 pm to ensure that this time he attends. The offender agrees that attendance would be good for him, but the program is confronting and an emotional struggle for him. So he would like the weekly support of his uncle to make him attend. Thus the uncle signs the agreement as well.

Note how restorative justice involves a shift from *passive responsibility* to which offenders are held by professionals for something they have done in the past to citizens taking *active responsibility* for making things right into the future. Active responsibility is a virtue of civic participation. As in the anger

management example, restorative justice is about creating participatory spaces where active responsibility might be taken by offenders, but not only by offenders. Active responsibility is sometimes shared by victims. Occasionally burglars will explain to victims in a conference why their house is such an attractive target for practitioners of their craft. The burglar will assist the victim, perhaps with help from a police officer who is also in attendance, to design a

target hardening strategy for which the victim voluntarily decides to take responsibility.

The evaluation literature now shows that restorative justice agreements are consistently more likely to be implemented in part or in full than court orders, even though sanctions may attach to non-compliance with court orders but not conference agreements (Latimer Dowden and Muise, 2001; Braithwaite, 2002). The reason for this success is that uncles are more effective at supporting agreements to attend an anger management program, to make regular compensation payments to victims, to do community service work than are judges. This may be one reason why recent meta analyses and literature reviews also find criminal cases assigned to restorative justice have statistically sig-

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nificantly lower reoffending rates than cases in non-restorative justice control groups (Latimer Dowden and Muise, 2001; Braithwaite, 2002; Nugent Williams and Umbreit, 2003).

Criminal justice with higher levels of civic participation simply works better most of the time in comparison to punitive justice imposed by professionals—not only in terms of crime prevention, but also in terms of stakeholders such as victims and offenders reporting that they have been treated fairly, not discriminated against because of their race or gender, had their rights respected, had their fear of re-victimization reduced, their anger reduced, and more (Braithwaite, 2002; Strang, 2003; Poulson, 2003).

But most of the time does not mean all the time. While restorative justice often works very well with corporate crime, for example, often it does not work well with business executives who are moved by the bottom line of their firm’s performance (Braithwaite, 2002: 17–24; 62–66). Some are simply not moved by learning about how they have hurt victims. When this is the case, the state must escalate its regulatory strategy from one based on restorative justice to one based on deterrence. But there are also many reasons why deterrence fails. One is that the business might respond to heavy legal penalties by going bankrupt. Then an incapacitative escalation is needed in response to the failure of deterrence. So the regulator might negatively licence the offender from ever holding a position of responsibility in a business organization that trades with the pub-

lic or it might put the offender in prison. Hence a restorative justice strategy must be backed up by a responsive regulatory strategy that assumes restorative justice will often fail. The idea of responsive regulation is that we have a preference for deliberative forms of regulation at the base of the regulatory pyramid, but we are willing to escalate through more and more interventionist strategies when these fail to protect the community from injustice. The pyramidal strategy seeks to cover the weaknesses of one regulatory strategy with the strengths of another (see Figure 1). It is a dynamic strategy that assumes all actors have multiple selves—a socially responsible self that we can appeal to through civic deliberation, a rational calculating self that we can touch with deterrence and irrational and incompetent selves that might only be managed by incapacitation. It is not a static

triage theory that says these are the cases that are suitable for restorative justice, and these are the more serious matters we must deter or incapacitate. One reason is that it is more serious injustices—notably violent as opposed to property crime—where the evidence is beginning to suggest restorative justice has the greatest comparative advantage over punitive justice.

This logic of the primacy of restoration over deterrence and intervention applies in the global arena as well that of domestic justice. Hence we are best to assume that even the socially irresponsible and seemingly irrational leadership of North Korea is best responded to with restorative justice as a first preference. Diplomacy should appeal to the socially

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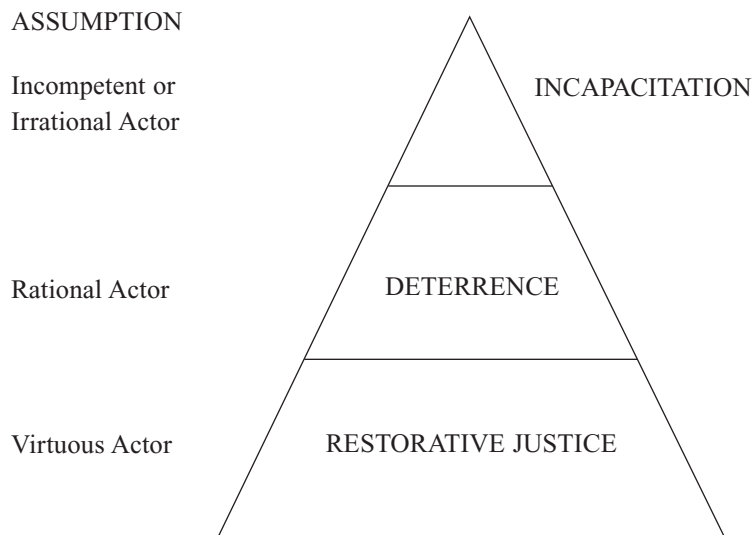


Figure 1: Toward an Integration of Restorative, Deterrent and Incapacitative Justice

responsible side of their engagement as a member of the world community. The nuclear non-proliferation regime has been remarkably successful in persuading the most evil of tyrants to abandon nuclear weapons programs. President Kennedy predicted more than forty years ago that by the 1970s there would be dozens of nuclear weapons states. One reason this has not happened is that dialogic inspections work. The nuclear non-proliferation regime works better than anyone could reasonably have expected, even in many hard cases like Iraq and Iran and South Africa. Responsive regulatory theory says it will work especially well when it is backed by a willingness to escalate to more deterrent and incapacitative measures. Yet the possibility of escalation must be threatening in the background, not threatened in the foreground of deliberative problem solving. The psychological evidence is that making threats engenders defiance (Sherman, 1993) or reactance (Brehm and Brehm, 1981). We will not persuade leaders to put their socially responsible self forward by rattling sabres at them or denigrating them as an axis of evil. Dialogue from a position of quiet strength works when the world community insists, as a united voice, that threats to the peace of innocents will not be allowed to stand. As with violent crime in the streets and corporate crime in the suites, the evidence suggests that restorative diplomacy can work with most states most of the time (Braithwaite, 2002: Chapter 6). The most recent work on restorative justice examines not only warlords who we ask to disarm but the citizens who have been damaged by war in a way that wills them to pass hatreds on to the next generation (Howley, 2003). Hatreds, in other words, must be healed from the bottom up as well as from the top down. So while the restorative diplomacy of professional diplomats is important, we constantly make the mistake of neglecting de-professionalized restorative justice for the victims of war.

The best place to start with a de-professionalized justice project is with children in schools, whether the injustice they have witnessed is an horrific war crime in which their parents were killed or tortured, or a more banal incident of school bullying. There is more to the democratic virtue of restorative justice than returning conflicts to the citizens from whom they have been stolen. Western democratic institutions were planted in the shallow soil of societies where disputes had been taken over by the king. Disputing over daily injustices is where we learn to become democratic citizens. And the learning is more profound when those daily injustices reveal deeply structured patterns of injustice. Engagement with them is de Tocqueville's apprenticeship of liberty. In Benjamin Barber's terms, democratic disputing is educative, central to learning to be free:

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We must be taught to be thinking, competent, legal persons and citizens. We are born belonging to others; we have to learn how to sculpt our individuality from common clay. The literacy to live in civil society, the competence to participate in democratic communities, the ability to think critically and act deliberately in a pluralistic world, the empathy that permits us to hear and thus accommodate others, all involve skills that must be acquired. Excellence is the product of teaching and is liberty's measure (Barber 1992: 4–5).

I remember in 1991, in the early days of restorative justice conferencing in Australia, suggesting to my colleague Terry O'Connell that it was a mistake to allow young children to attend and participate in conferences. Sometimes it is, but basically empirical experience has proved me wrong. In conferences, children are learning to be democratic citizens. The adults are mostly wise enough to make allowance for the unsophistication of much of what they say and to support them, help them establish the relevance of their point of view. Often it is the very unsophistication of the child's legitimate perspective that is so moving: "I've listened to what you've said about [my big brother]. It's not true. He is always kind to me; he helps me when I don't know what to do. I don't know any boy who is kinder than my brother."

All children personally encounter bullying in school through their own experiences or those of their friends being perpetrators or victims. All children therefore can be given the opportunity of learning to be democratic citizens through taking active responsibility for the bullying problem in their schools. The evidence is that restorative approaches to school bullying work in reducing its incidence, but this may be the less important outcome than the teaching of democratic citizenship (Morrison, 2003).

Once citizens learn to be actively responsible as opposed to learning to rely totally on protection by a state that enforces passive responsibility, they are more likely to become active in social movement politics. The lessons of restorative justice need not be confined to the realm of the courtroom; NGOs offer another great avenue for revitalizing meaningful forms of citizen participation in a democracy. They can be as relevant to democratizing global institutions such as the IMF, the World Bank and the WTO as they can be to re-democratizing the state (Braithwaite and Drahos 2000).

NGO influence can feed back into restorative justice conferences as advocacy of making the personal political, by invoking the possibility of agitating for structural change. Most importantly, the justice of the people can put pressure on the justice of the law and create change. This indeed is a shared project of

the partnerships restorative justice advocates seek to forge with other social movements against domination.

However, just as we want the justice of the people to have an institutional channel to speak to the justice of the law, so we should want the justice of the law to filter down into the justice of the people (Braithwaite and Parker, 1999). The tyranny of the majority is always a risk in the justice of the people. We do need the rule of law, interpreted by legal professionals, to provide a check and balance on the many possible tyrannies of the justice of the people. It is not good enough to conclude that empirically citizens feel their rights are better protected in most restorative justice conferences than in court cases (so the restorative justice path is the path to a richer rights culture). We also need an analysis of what should happen when rights are abused in restorative justice processes, as they often are (Braithwaite, 2002: Chapter 5).

The youth conferencing legislation of the Australian state of New South Wales guarantees young people free access to a legal advice hotline if they are offered an opportunity for a conference. So if for example they or their parents feel a conference seeks to impose on them a more onerous punishment than a court would ever impose for the same offense, they can ask for the adjournment of a conference while they seek advice from a lawyer on the hotline. Indeed, they can do this after they have signed a conference agreement, repudiate the agreement and take their chances in court. Such legal safeguards are vital to a rule of law that secures republican freedom as non-domination (Pettit, 1997). Just as demonstrated in the enforcement pyramid, deliberative democracy does most of the work of securing compliance with the law but more professionalised forms of law back it up when it fails, so restorative justice does most of the work of protecting rights and securing freedom as non-domination. But when restorative justice fails to do so, there is a professional justice of lawyers watching and stepping in to check any civic participation that produces tyranny. That intervention of course should be grounded in laws that a democratically elected legislature has enacted to create minority rights that can fly in the face of any majority consensus produced by a deliberative process. Hence, like Olson and Dzur (2003) my argument is not for doing without professionalism, but for nurturing a non-dominating professionalism that facilitates civic engagement and facilitates checking one form of engagement with another.

### Conclusion

The use of restorative justice circles to confront problems that all children confront—such as school bullying—can be a universal apprenticeship in civic engagement. The fact that it works in reducing bullying is a nice bonus. It works because citizen

commitment is the stuff of effective and just social control. A society where we relied mainly on lawyers to enforce rights would be a dangerous society. A society where our reliance on civic engagement to secure rights was so total as to abolish legal professionalism would also be tyrannous in conditions of complex modern societies.

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