

### 3.5 Restorative Justice

JOHN BRAITHWAITE

#### Table of Contents

1	Diverse Forms of Restorative Processes . . . . .	497
2	Restorative Justice and Motivating a New Future for Crime Prevention . . . . .	500

#### 1 Diverse Forms of Restorative Processes

Restorative justice as a process ideal means a process where all the stakeholders affected by a crime have an opportunity to come together to discuss the consequences of the crime and what should be done to right the wrong and meet the needs of those affected. Of course such an ideal is secured to greater and lesser degrees. Mediation between just a victim and just an offender can reasonably be described as a restorative process, but it does exclude other stakeholders such as the family of the offender. Hence, by this process definition, one on one victim-offender mediation is not as restorative as a conference or a circle to which victims and offenders are encouraged to bring their families and other supporters. In a restorative justice conference both victims and offenders are asked to bring along the people who they most trust and respect to support them during the conference. The offender first describes in his own words what happened. Then the victim and others who sit in a circle describe the consequences of the crime, how they have been hurt by it. Then an agreement is reached on what should be done to right the wrong. Usually this will be signed by the victim and the offender.

Restorative justice is not only about processes, however. It is also about values. It is about the idea that because crime hurts, justice should heal. The key value of restorative justice is non-domination (Braithwaite and Pettit 1990; Braithwaite 2002). The active part of this value is empowerment. Empowerment means preventing the state from "stealing conflicts" (Christie 1977) from people who want to hang on to those conflicts and learn from working them through in their own way. Empowerment should trump other restorative justice values like forgiveness, healing and apology, important as they are. This means that if stakeholders in an injustice wish to respond in a retributive way, taking empowerment seriously requires that they be allowed to opt for a retributive resolution to the injustice rather than a restorative outcome. But because non-domination is the fundamental value that motivates the operational

value of empowerment, people are not empowered to breach fundamental human rights in their pursuit of revenge. So if a woman has shamed her partner by say sexual infidelity, rape is an unacceptable punitive response, indeed is an injustice that itself must be confronted by a non-dominating process. The fundamental human rights that almost all states enshrine in their law, if not in their political practice, must set limits on the domination community justice can impose. These laws include upper limits on the punishments that can be imposed for defined types of wrongdoing.

Participants are not empowered to shout and intimidate in restorative justice processes because the empowerment of the one is then purchased at the price of the domination of the many. Respectful listening is thus also a fundamental restorative justice value. Respectful listening is indeed integral to empowerment for reasons that have been eloquently articulated by *Kay Pranis* (2001). Human beings are storytelling animals. You can tell how much power a person has by observing how many people listen attentively to their stories. It follows from this that we can empower the powerless by institutionalizing more effective listening to their stories of injustice. This is what restorative justice is about, the deadly simply empowerment that comes from creating pacified spaces where we listen to those we feel have wronged us and those we think we may have wronged.

Vital, yet subsidiary, restorative justice values like forgiveness and apology are not values we actively seek to persuade people to manifest, in the way we do seek to actively persuade respectful listening. Forgiveness and apology are gifts; they only have meaning and power if they are freely chosen by those who give them in response to an injustice. Yet the theory of restorative justice is that by creating safe spaces where people listen respectfully to the stories of the other about the injustices they believe they have suffered, forgiveness and apology are more likely to issue. There is now quite a bit of empirical evidence that this empirical claim of the theory of restorative justice is broadly correct (*Braithwaite* 2002, Chapter 3).

The prescriptive normative content of restorative justice is therefore rather minimalist – non-domination, empowerment, respectful listening and a process where all stakeholders have an opportunity to tell their stories about the effects of the injustice and what should be done to make them right. There is a lot of other normative content to restorative justice, for example that forgiveness, apology, remorse for the perpetration of injustice, healing damaged relationships, building community, recompense to those who have suffered, are all mostly good things. But there is no prescription that these things must happen for the process to be restorative justice. The explanatory theory of restorative justice is that these things are more likely to happen under a restorative than under a retributive process. And indeed part of the normative theory of restorative justice is that because these things are more likely to happen under restorative justice than retributive justice, restorative justice is generally preferable, at least until it has proved incapable of dealing with the injustice.

The minimalism of the prescriptive content of restorative justice means there is no right or best model. This means we should have limited interest in whether a particular model of conferencing is superior to another circle process, whether the South African Truth and Reconciliation Commission process is superior to the processes of

reconciliation being worked through in Bougainville. Restorative justice is culturally plural, historically pragmatic and contextual about what might prove to be the best process to deal with an injustice that arises at any specific point in space and time. While there are many reasons why a more complex circle where all stakeholders sit together might make for more effective restoration with less troubling imbalances of power than a series of one on one mediations, there are contexts where the dyad heals better than the circle. So we cannot say that dyadic forms of mediation that individualise disputes in an all too Western way is an inferior form of restorative justice.

Where there is a distinction to be made here, however, is that restorative justice is about dealing with injustice and it is not morally neutral about injustice. Again, injustice is defined in terms of domination and it is seen as a bad thing. So restorative justice is a philosophy that rejects the moral neutrality of mediation that defines everything in the morally neutral language of conflict. For the normative theorist of restorative justice, a rape is not a conflict, it is an injustice by virtue of the domination involved; rape is the denial of a human right that is fundamental to citizens living without fear of domination. Of course there are conflicts that are best dealt with in the morally neutral language of conflict and we might do best to deal with them restoratively too. But whenever domination produces injustice, the moral obligation of the restorative justice advocate is to argue respectfully, but passionately if need be, for confronting the particular injustice.

A great deal of innovation with restorative justice is now underway around the world. Sometimes there will be a series of restorative justice circles or conferences. For example, the North Minneapolis African American Circles hold a series of circles for each offender. The first is the interview circle at which the offender and his or her parents/guardian meet the circle volunteers and decide whether they wish to participate in the program. The program is described in some detail so as to allow the young person to make an informed choice. The crime itself is not mentioned in this meeting. At this meeting the young person's needs and interests are also considered so that individual members of the circle can begin to act as mentors to the young person. So for instance, in a circle my colleague *Declan Roche* attended (I am relying on his fieldwork notes here; see *Roche (2003)*), it was established that the young person was a keen basketball player. Some of the male members of the group said they would go and watch the young offender play. The circle also identified that the young person had a problem with maths. Another volunteer said she would assist the young person with his maths. If the young person agreed to participate in the program, and the volunteers agree to accept the case, a second circle is held in which the crime is discussed, and a social compact developed (which involves a number of commitments by the young offender). Another circle is held for the victim. A fourth circle is held for the victim and offender – a healing circle. Other circles are then held to monitor completion of social compact the young person makes, culminating in a celebration circle where the group celebrates the young person's completion of his agreement.

In Africa, Asia and the Pacific, there is a particularly rich diversity of restorative justice forms. Serious study of this diversity has been an undeveloped kind of scholarship. Equally European criminology needs to rise to the challenge of studying the

richness of its own restorative histories – Germanic moots as restorative institutions (see *Weitekamp* 1998), sanctuary as a Medieval restorative institution of Christendom (*Shoemaker* 2002).

## 2 Restorative Justice and Motivating a New Future for Crime Prevention

For 50 years citizens of Western societies have been pessimistic about crime. They have seen crime as one of those things that is always getting worse. There are actually a lot of reasons for optimism that we have the capacity to reduce crime over the next 50 years in the West by more than it has risen over the last 50. Accomplishing this would require a greater commitment to social justice than we have shown in recent decades, to guaranteeing economic security to all. This is a very large challenge in nations like the US that have such wide inequality, yet the considerable reductions in long-term unemployment accomplished during the Clinton years show that it is possible to make a big difference through better policy choices (*Stiglitz* 2004). However it would also require a shift away from punitive justice so that the resources freed up by reducing prison populations could be devoted to restorative justice and crime prevention. One of the attractive features of restorative justice is that it can provide a superior vehicle for motivating crime prevention.

*Ken Pease* (1998) has argued that while we know a lot about how to prevent crime, we know little about how to motivate people to put in place what works. Crime prevention fails mainly for a want of motivation. But one of the things we do know about restorative justice is that it builds superior motivation to actually do what is decided in criminal justice processes. The research evidence is that even though court orders to compensate victims, do community service, or join rehabilitation programs are legally enforceable, restorative justice agreements to do these things are more likely to be complied with than court orders. In a Canadian Department of Justice meta-analysis of 34 evaluations from around the world, compliance with undertakings in restorative justice processes was 33 % higher than in control groups (*Latimer, Dowden and Muise* 2001). This is a result of the empowerment features of restorative justice – citizens feel empowered to commit to or reject the conference agreement. Offenders can also commit more effectively when they have the support of loved ones for the difficult things they have to do. One of the things restorative justice delivers rather well is the support of loved ones for people in trouble with the law.

The problem with our existing restorative justice programs is that they fail to exploit this motivational lever of successful crime prevention. We have not developed our capacities to communicate to restorative justice conferences what we know about what kinds of rehabilitation programs work for what kinds of people, what kinds of crime prevention programs work in what contexts. When we do marry restorative justice and crime prevention in this way, we may make rehabilitation programs and crime prevention programs work in practice better than they do at the moment. And we may make restorative justice work better than it does at the moment.

Recent evidence is becoming increasingly encouraging that, even without this, restorative justice can help to reduce crime. Certainly our Canberra restorative justice con-

ferencing has been deficient in its linkage to well resourced rehabilitation and prevention programs and has produced some of the most discouraging evaluation results. This when the most methodologically impressive experimental research reported has been *Lawrence Sherman and Heather Strang's* (2000) Re-Integrative Shaming Experiments (RISE) on 1285 Canberra criminal offenders. To date this program has produced mixed results, with a reduction of reoffending in the violence experiment and an increase in the property experiments (*Sherman* 2003).

In 1999 I published a review of the evidence that reached encouraging, though hedged, conclusions about the efficacy of restorative justice (*Braithwaite* 1999). Only one of more than thirty studies could be interpreted as showing an increase in reoffending for any type of offender put into restorative justice programs and many showed reduced offending.

Three years later, this optimism has been increased by new evidence. First results of a replication of the Canberra RISE experiments on minor juvenile offenders in Indianapolis by *McGarrell et al* (2000) reveals a reoffending rate for cases randomly assigned to a restorative justice conference 40 per cent lower than in the control group after 6 months, declining to 25 per cent lower after 12 months. Another set of results of great importance are those from the John Howard Society's Restorative Resolutions project in Winnipeg. The reoffending rate of the Restorative Resolutions group was one third of that in a matched control group (*Bonta and Wallace-Capretta* 1998). The importance of this result is that it comes from a sample of serious adult offenders referred by prosecutors, Aboriginal legal aid and other organizations at the deep end of the system. Cases were not supposed to go into the restorative diversion unless they were headed for a prosecutorial recommendation of at least six months of prison time, an objective achieved in 90 per cent of the cases. *Maxwell, Morris and Anderson* (2000) evaluated two adult restorative justice programs in New Zealand where similar reductions in reoffending occurred compared to a control group.

*Gale Burford and Joan Pennell's* (1998) study of a restorative conference-based approach to family violence in Newfoundland found a marked reduction in both child abuse/neglect and abuse of mothers/wives after the intervention. A halving of abuse/neglect incidents was found in the year after the conference compared to the year before, while incidents increased markedly for control families. *Burford and Pennell* (1998: 253) also report reduced drinking problems after conferences. Their program actually did a better job than most of informing families of alcohol abuse and other rehabilitation programs that might be relevant to their case and helping to access those programs.

These six programs where important evaluations have been published since 1999 showing real reductions in reoffending have substantially increased the quantity and quality of the evidence that restorative justice can reduce crime. From what I know of these programs they are riddled with a variety of kinds of poor restorative justice practice. Yet still they are found to reduce reoffending. Another encouraging recent study was a meta-analysis of 34 evaluations of restorative justice programs by the Canadian Department of Justice (*Latimer, Dowden and Muise* 2001). It found significantly lower reoffending in the restorative justice cases compared to control groups,



greater satisfaction of victims and offenders with the justice received among the restorative justice group and a much higher level of completion of agreements or orders in the restorative justice group.

Reducing reoffending is just one objective of restorative justice. It should also improve justice. It should be fairer. Certainly offenders who participate in restorative justice consistently across a number of studies perceive it to be fairer than court (Braithwaite 2002: Chapter 3). What distinguishes restorative justice from retributive justice is that it is as concerned with justice for victims as it is for justice for offenders. Again the evidence is that victims, like offenders, are more likely to feel they are treated fairly, to feel that their rights are respected, following restorative justice than they are after a court case. This is because victims get more of a say in restorative justice.

*Heather Strang's* (2002) recent research has refuted both the common complaint of victim advocates that supposedly soft restorative justice sacrifices victim rights for offender rights, just as it refutes the claims of youth advocates that restorative justice, by giving victims more influence, compromises offender rights. Her research suggests that the opposite is true: that both offenders and victims are likely to believe they are treated more fairly in conferences – that while win-win for victims and offenders is more likely in conferences than in court, win-lose and lose-lose are more likely in court. This is brilliant research that cuts to the heart of the dilemmas of justice in a very new way.

Another thing restorative justice should accomplish is healing. Punitive justice is about returning hurt for hurt. Restorative justice is about the idea that because crime hurts justice should heal. Again *Heather Strang's* (2002) evidence is encouraging that both victims and offenders do experience healing in restorative justice processes. Equally she and *Lawrence Sherman* are increasing our understanding of the circumstances where this does not occur, where victims feel worse after a conference.

Finally, restorative justice involves a very different way of thinking about criminal law jurisprudence. Restorative justice is more successful in getting offenders to take responsibility for their wrongdoing. This happens because they experience greater remorse than in traditional criminal law processes. This greater taking of responsibility is reflected, for example, in the Canadian meta-analysis results referred to earlier that shows greater completion of agreements to compensate victims, do community service and so on in restorative justice in comparison to traditional criminal justice.

*Declan Roche* and I in the past have written that restorative justice shifts the balance of how we think about criminal responsibility toward a greater emphasis on active responsibility as opposed to passive responsibility (Braithwaite and Roche 2000). Passive responsibility is the traditional Western model of criminal responsibility. It means **holding** someone responsible for something they have done in the past. Active responsibility means **taking** responsibility for putting things right for the future. Active responsibility is a virtue. The idea of a restorative justice conference is to create a space where offenders will be given an opportunity to take active responsibility.

Our argument is that active and passive responsibility in criminal law maps onto active and passive deterrence, active and passive rehabilitation and active and passive

incapacitation. Here I will only discuss what active and passive deterrence means. The argument is that active responsibility in restorative justice enables a more active form of deterrence in criminal law. Consider the restorative approach we have been developing in Australian business regulation. First the regulator meets with the agents in the corporation who seem most passively responsible for the law breaking, together with some victims where appropriate. Because the corporate actors most directly responsible have most to lose from a criminal conviction of the corporation, they will do everything possible to deny and avoid passive responsibility, and so will be hard targets for regulators. For Benthamite corporate crime fighters that is the end of the story – another contested court case they don't have the resources to fight, another defeat at the hands of the 'tough nuts' who control corporate power. But we know that just as corporate crime is over determined (that is, it is brought about by two or more causes, any one of which alone would have sufficed), there is usually more than one person in an organization with the power to repair the resulting harm. So what we do is move up the organization, widening the circle of dialogue, convening another conference to which we invite the hard target's boss. Often the boss will turn out to be a hard target as well. So convene another conference when that fails and invite her boss. Restorative justice processes of this kind have been described where this led right up to the Chief Executive Officer, who was the toughest nut of them all (Parker 2004). But then the Australian business regulator widens the circle to include the Chairman of the Board. He was shocked at this recalcitrant unwillingness to restore the victims' losses and reform the corporation's compliance systems. The Chairman actually fired the CEO in one famous case (Not very restorative!).

Corporate crime is actually not so different from common crime in being mostly a collective, or at least a socially embedded, phenomenon, where there are many actors with preventive capabilities. So one interpretation for the success of whole school anti-bullying programs in reducing bullying up to 50 % (Olweus 1993), is in these terms. Whenever a fourth grader is bullying another child, many children in the school, particularly from fifth grade up, are in a position to intervene to prevent the bullying. From a deterrence theory perspective, therefore, whole school anti-bullying programs work because the deterrence target shifts from the bully (a hard target to deter passively) to active deterrence of responsible peers of the bully.

One reason for empowerment being a central value of restorative justice is that it encourages people to take active responsibility and that active responsibility delivers, among other things, active deterrence. The environmentally conscious citizen of the corporation intervenes to stop the environmental crime even though she had no passive responsibility for causing it. A school friend intervenes to stop bullying even though she bears no passive responsibility for it. An ideal of the design of restorative institutions is to create democratic spaces for nurturing of the virtue of active responsibility among citizens, young and old.

In the context of violence against women, Braithwaite and Daly (1994) have argued that restorative justice is more likely to be taken seriously, attempted, and to actually work, if it is located within a dynamic enforcement strategy where the upshot of repeated failure of restorative conferences will be escalation to deterrence and incapacitation.

tation. This is not to advocate restorative justice transacted on the basis of threat. Rather it is to say that powerful criminals are more likely to succumb to the entreaties of restorative justice when deterrence is threatening in the background instead of threatened in the foreground (for the theory, see Ayres and Braithwaite 1992: 47–51).<sup>1</sup> The idea is not that deterrence is there as an ever-present passive threat, but that everyone knows it is democratically available as an active possibility if dialogue fails or is spurned. Because “everyone knows” this, there is no need to make threats; indeed to do so is counterproductive. So an offender who chooses not to participate in a conference knows the alternative is an appearance in court, where he will be subject to passive responsibility.

Conferences can be a superior vehicle for rehabilitation and crime prevention programs; they can do better at helping offenders to experience remorse and take responsibility for righting their wrongs; they can give victims the voice they deserve; they can help to heal victims, offenders and communities from past crimes as they prevent future crimes. While restorative justice can deliver all of this more often than traditional criminal processing, it often fails to do so as a result of bad practice. Quality assurance tends to be abysmal in restorative justice programs. Some restorative justice advocates do not even believe in continuous improvement in quality because they think their program is already perfect. The arrogance of the new can be as dangerous as the arrogance of the old that has presided over the West’s post-war increase in crime. Best to resolve to be both hopeful and humble about restorative justice.

As we do that, we can inform both our hope and humility with quality research. The basis for hope that I have tried to communicate in this essay is that in recent years we have seen a lot of encouraging findings, admittedly mixed in with some discouraging results, from programs that only partially satisfy sound restorative justice principles. I think we can reasonably hope to achieve a lot more as we improve the consistency of the quality of restorative justice programs. In particular, if we do what we are hardly doing at all at the moment – rethinking restorative justice as a vehicle to deliver what we know works best in rehabilitation and crime prevention – then we might design restorative justice to be a significant contributor to crime reduction and to significantly advance a range of other justice values.

### References

- Ayres, I. & Braithwaite, J. (1992): *Responsive Regulation: Transcending the Deregulation Debate*. Oxford: Oxford University Press.
- Bonta, J., Rooney, J. & Wallace-Capretta, S. (1998): *Restorative Justice: An Evaluation of the Restorative Resolutions Project*. Ottawa: Solicitor General Canada.

1 Open threats (threats uttered in the foreground) risk provoking resistance (Braithwaite 1997) while unspoken threats left in the background provide an opportunity to motivate a wrongdoer by the positive regard of being trusted to repair the harm (Ayres and Braithwaite 1992: 47–51).



- Braithwaite, J.* (1997): On Speaking Softly and Carrying Sticks: Neglected Dimensions of Republican Separation of Powers. *University of Toronto Law Journal* 47: 1–57.
- Braithwaite, J.* (1999): Restorative Justice: Assessing Optimistic and Pessimistic Accounts. In: Tonry M (ed.): *Crime and Justice: A Review of Research*. Vol. 25, Chicago: University of Chicago Press, pp. 1–127.
- Braithwaite, J.* (2002): *Restorative Justice and Responsive Regulation*. New York: Oxford University Press.
- Braithwaite, J. & Daly, K.* (1994): Masculinities, Violence and Communitarian Control. In: Newburn, T. & Stanko E. (eds.): *Just Boys Doing Business*, London and New York: Routledge.
- Braithwaite, J. & Pettit, P.* (1990): *Not Just Deserts: A Republican Theory of Criminal Justice*. Oxford: Oxford University Press.
- Braithwaite, J. & Roche, D.* (2000): Responsibility and Restorative Justice. In: Schiff, M., Bazemore, G. (eds.): *Restorative Community Justice*. Cincinnati, Ohio: Anderson.
- Burford, G. & Pennell, J.* (1998): *Family Group Decision Making Project: Outcome Report Volume I*. St. John's: Memorial University, Newfoundland.
- Christie, N.* (1977): Conflicts as Property. *British Journal of Criminology* 17: 1–26.
- Latimer, J., Dowden, C. & Muise, D.* (2001): *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*. Ottawa: Department of Justice, Canada.
- McCulloch, H.* (1996): *Shop Theft: Improving the Police Response*. Home Office Police Research Group Crime Detection and Prevention Series Paper 76. London: HMSO.
- McGarrell, E. F., Olivares, K., Crawford, K. & Kroovand, N.* (2000): *Returning Justice to the Community: The Indianapolis Juvenile Restorative Justice Experiment*. Indianapolis, IN: Hudson Institute.
- Maxwell, G. M., Morris, A. & Anderson, T.* (1999): *Community Panel Adult Pre-Trial Diversion: Supplementary Evaluation*. Research Report, Crime Prevention Unit, Department of Prime Minister and Cabinet and Institute of Criminology, Victoria University of Wellington, New Zealand.
- Olweus, D.* (1993): Annotation: Bullying at School: Basic Facts and Effects of a School Based Intervention Program. *Journal of Child Psychology and Psychiatry* 35: 1171–1190.
- Parker, C.* (2004): Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings. *Modern Law Review* 67(2): 209–246.
- Pease, K.* (1998): Crime, Labour and the Wisdom of Solomon. *Policy Studies* 19(3–4): 255–266.
- Pranis, K.* (2001): Democratizing Social Control: Restorative Justice, Social Justice, and the Empowerment of Marginalized Populations. In: Bazemore, G. & Schiff, M. (eds.): *Restorative Community Justice*, Cincinnati: Anderson Publishing.
- Roche, D.* (2003): *Accountability in Restorative Justice*. Oxford: Oxford University Press.
- Sherman, L.* (2003): Reason for Emotion: Reinventing Justice With Theories, Innovations, and Research. The American Society of Criminology, 2002 Presidential Address. *Criminology*, 41: 1–38.
- Sherman, L., Strang, H. & Woods, D.* (2000): *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE)*. Canberra: Centre for Restorative Justice, Australian National University.
- Shoemaker, K.* (2002): *Sanctuary Law's Emergence in the Early Middle Ages*. Unpublished Manuscript, University of Wisconsin.
- Stiglitz, J.* (2004): *The Roaring Nineties*.

### 3 Soziale und Persönlichkeitsprobleme

*Strang, H.* (2002): *Repair or Revenge: Victims and Restorative Justice*. Oxford: Oxford University Press.

*Weitekamp, E.* (1998): *The History of Restorative Justice*. In: Walgrave, L. & Bazemore, G. (eds.): *Restoring Juvenile Justice*, Monsey, NY: Criminal Justice Press.