

## DECOMPOSING A HOLISTIC VISION OF RESTORATIVE JUSTICE

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A critical element in any discussion of restorative and transformative justice is the relationship between means and ends, that is, the extent to which each contributes to restoring relationships that have been severed in some way. Paul McCold and Lode Walgrave, in their debate over how broad or inclusive the boundaries of restorative justice should be, have addressed such issues in a variety of ways. One of the important outcomes of their discussion and of any discussion on restorative justice is the importance of hearing the stories of those who have been harmed, because emotional restoration is seen as a key element in justice done.

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### THE RESTORATIVE PROCESS AND OUTCOME DEBATE

The debate between Paul McCold and Lode Walgrave may be of greater value as a debate to have than as one to resolve. In this, it is like the debate between those who prefer restorative justice and those who opt for transformative justice. That is, the important thing is that restorative advocates take on board the concern that restoration of unhealthy relationships or power imbalances that should be transformed is undesirable. And transformative justice advocates need to take on board the concern that transformation may seem an open-ended normative agenda that will fail to communicate values to guide action unless there is clarification of what kind of transformation we want.

The biggest contribution of Paul McCold's paper is, therefore, its journey to the conclusion rather than the conclusion itself. Figures 2–6 were

a wonderful contribution, particularly the conceptualization of victim injury as loss of trust, loss of faith, sense of isolation, disbelief in experience, cognitive shock, and so on.

Like McCold, I find Tony Marshall's short definition of restorative justice the most useful when I need a one sentence definition: "Restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future".

Like Bazemore and Walgrave (1999), in that form I find it both too restrictive and too broad: too restrictive because restorative justice can happen outside the specified process (e.g. when victims are healed even though their offender has never been discovered), and too broad because it reads as a process definition when restorative justice requires value commitments as well as process commitments. On the latter, McCold makes some good points about repair being incorporated as a value into the elaborated Marshall definition. But I am still not satisfied because there are more values at stake than repair, including the ones McCold himself so eloquently outlines in Figures 2-6.

The good thing about Marshall's definition is that it outlines a process ideal in a succinct way. It tells us that, from the normative perspective of restorative justice, a process that excludes certain stakeholders is inferior. But most restorative justice advocates would be loathe to say that it was not possible to have restorative justice for a homicide simply because the victim could not attend. And I could not agree with McCold that remorse cannot have much meaning unless it is expressed to the victim (p. 27)—implying that there can be no meaningful sense of remorse in a case of homicide. So I prefer to think of Marshall's definition as a process ideal which cannot always be fully realized because one of the stakeholders cannot or will not participate.

It seems to generate agreement around something like the Marshall conceptualization of the process ideal than it is to reach agreement on the values restorative justice seeks to realize. I certainly share with Walgrave a commitment to repairing the harm of a crime and restoring dominion as values to be realized through restorative justice. But what counts as a harm? Dominion or freedom as non-domination is also a rather abstract value. Philip Pettit and I have derived from dominion a large number of more concrete values which are proposed as objectives of any decent criminal justice system (Braithwaite and Pettit, 1990). But many people are not republicans and so may find non-domination and its derivative values controversial to varying degrees.

We will return to the question of where to go on the values question. At this point, I simply want to agree with McCold that a holistic conception

of restorative justice requires both process and values commitments. If not on the process side, then certainly on the values side, the debate on what are the values the realization of which makes a process restorative has barely begun. And closure on this debate would be premature.

If we have a conference in which all of the parties with a stake in the offense participate actively and it is decided to boil the offender in oil and criticize the victim for bringing the trouble on herself, for outcome reasons we would not want to say the conference was restorative. Conversely, if a judge makes a non-punitive order to help both an offender and a victim to get their lives back together but refuses to hear submissions from them that this is not the kind of help they want, for process reasons we would be reluctant to call this restorative.

We might say that criminal justice decisions can be arranged along one continuum according to how restorative the process is and another according to how restorative the outcomes are. Whether we are happy to call something restorative will depend on a balancing of the restorativeness of process and outcome.

If we accept a single integrating desideratum for the criminal justice system, such as freedom as non-domination, this can be a yardstick that brings the weighing of process and outcome onto a common metric. The idea of republican theory is that something like stakeholder participation would not be a process requirement unless, in a majority of cases, it was a process that increased freedom as non-domination. The checks and balances of republican non-domination would require the courts to overrule stakeholder empowerment in unusual cases when they decided to boil an offender in oil or breach upper punitive limits in some other way. However, in cases where no fundamental human rights are violated by a conference or circle decision, but it is just that the stakeholders have opted to be more punitive and less restorative than we might like, there is little choice but to take stakeholder empowerment seriously and implement their consensus decision. The analogy is to respecting the vote of a democratic electorate to choose a government that honors democratic values less than we would like.

Moreover, those of us who are restorative justice advocates should not assume that the maximally restorative process and outcome will always be best. A maximally restorative process would be an overreaction in many contexts. The police officer catches a child stealing a chocolate bar from a store. Returning the bar and giving the child a chance to apologize followed by taking the child home to mom and dad to let them deal with it is more restorative than doing nothing, laying charges, or giving the child an "old-fashioned kick in the pants." In the home, if a child is discovered taking something that belongs to her sister, it may be sufficient to the

circumstances to ask the first child how she thinks her sister would feel if she finds her possession missing and get her to agree to put it back without her sister ever knowing. This would be a more restorative practice than hitting or yelling at the child, but less restorative than convening a conference with the sister and the rest of the family. But the full restorative stakeholder production might be quite an overreaction to a minor infraction. Finally, we have also seen that circumstances will often prevent full restorative process even where we might want it or because a victim, offender or their families are unwilling or unable to participate.

### WHICH VALUES?

I have stated a preferred normative position to make judgments about both the restorative process continuum and the restorative values continuum according to how well they deliver freedom as non-domination. And I have concluded that Marshall's restorative process definition defines the process ideal in a way that is practical and normatively satisfactory in republican terms.

On the restorative values side, it is much harder to define a set of restorative values that could be the basis for the consensus on the outcome side that Marshall/McCold have supplied on the process side. The level of difficulty here is well illustrated by the swirling contemporary debates among leading restorative justice scholars on the notion that punitive or even retributive values perhaps should have a respected place in restorative justice (Daly & Immarigeon, 1998; Barton, 1999).

Let me attempt a practical proposal that might be a basis for a working consensus to frame an ongoing restorative values clarification debate. It is to take the values and rights in the Universal Declaration of Human Rights to frame the foundational values and rights in restorative justice processes. The first clause of the Preamble of the Universal Declaration that most states have ratified is:

"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . ."

Obviously freedom, justice, and peace have a lot of appeal to someone who values republican freedom to frame the pursuit of justice and peace-making in restorative justice. Moreover these values have wide appeal that justifies their inclusion in the first clause of such a universalist document.

In addition, human dignity and equal rights have appeal both in general and in particular as justifying decent restorative practices.

In its 30 Articles, the Universal Declaration defines a considerable number of slightly more specific values and rights that seem to cover many of the things we look to restore and protect in restorative justice processes. These include a right to protection from having one's property arbitrarily taken (Article 17), a right to life, liberty, and security of the person (Article 3), a right to health and medical care (Article 25), and a right to democratic participation (Article 21).

From the restorative justice advocate's point of view, the most interesting Article is 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Of course, all states have interpreted Article 5 in a most permissive and unsatisfactory way from a restorative justice point of view. The challenge for restorative justice advocates is to take the tiny anti-punitive space this Article creates in global human rights discourse and expand its meaning over time so that it increasingly acquires a more restorative interpretation. This is precisely how successful NGO activists have globalized progressive agendas in many other arenas, that is, starting with a platitudinous initial rights and values framework and injecting progressively less conservative and more specific meanings into that framework agreement over time (Braithwaite and Drahos, 2000). From this perspective, the nice feature of international human rights law is that it carefully defines what torture is but diplomatically avoids pronouncing on what cruel, inhuman, and degrading punishments are.

We can already move to slightly more specific and transformative aspirations within extant human rights discourse by moving from the Universal Declaration of 1948 to the less widely ratified International Covenant on Economic, Social and Cultural Rights of 1976 and the International Covenant on Civil and Political Rights of 1966. The former, for example, involves a deeper commitment to "self-determination" and allows for a commitment to emotional well-being under the limited rubric of a right to mental health. The 1989 Second Optional Protocol of the Covenant on Civil and Political Rights includes a commitment of parties to abolish the death penalty, something most restorative justice advocates would regard an essential specific commitment. Equally most restorative justice advocates would agree with all the values and rights in the United Nations Declaration on the Elimination of Violence Against Women of 1993 and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly in 1985. The latter includes some new relevant values not so well traversed in other human rights instruments such as "restoration of the environment" (Article 10), "compassion" (Article 4), "restitution" (various

Articles), "redress" (Article 5) and includes specific reference to "restoration of rights" (Article 8) and "Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices" which "should be utilized where appropriate to facilitate conciliation and redress for victims" (Article 7).

The final Article of the Universal Declaration itself also makes limited reference to responsibility and community: "Everyone has duties to the community in which alone the free and full development of his personality is possible".

### A PROPOSAL

So my proposal for a starting framework for a debate on the content of restorative justice values is as follows:

1. Restorative justice programs should be evaluated according to how effectively they deliver restorative values which include respect for fundamental human rights as 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.

2. Restorative values include the following values to be found in the above international human rights agreements:

- Restoration of human dignity
- Restoration of property loss
- Restoration of injury to the person or health
- 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 empowerment or self-determination
- Restoration of a sense of duty as a citizen.

As a list of specific restorative values this is unsatisfactorily incomplete, for example, in the non-inclusion of mercy and forgiveness, which are nowhere to be found as values in these documents. Let us hope that at the 2000 United Nations Congress on the Prevention of Crime and Treatment of Offenders, there will be a restorative justice debate that moves the United Nations system toward a remedy to such deficiencies. As a republican, the way I would handle those deficiencies is to argue that the omissions follow logically from a commitment to a republican conception of freedom (a value which is on the list). Notwithstanding the omissions, the list includes more than it excludes and may constitute a minimally controversial starting point for a debate on restorative values.

### THE CRUCIAL DEBATE: EMPIRICAL UNDERSTANDING OF EMOTIONAL RESTORATION

The final deficiency of the list is that it is most impoverished in its specificity precisely where the research indicates that richness of restoration is most important. I refer to emotional restoration, which I take now to be well established in the literature as normally more important than material reparation. Here is where Paul McCold's contribution is so valuable in putting on the agenda of the holistic values debate fresh conceptions such as restoring belief in experience through victims being able to tell their story and redress of cognitive shock through getting answers to questions. We can tolerate a lot of ambiguity about what restorative justice means while we get on with the really important work of coming to grips with the power of such conceptions.

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