

Principles of Restorative Justice

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Restorative justice, conceived as an intellectual tradition or as an approach to political practice, involves radical transformation. On this radical view restorative justice is not simply a way of reforming the criminal justice system, it is a way of transforming the entire legal system, our family lives, our conduct in the workplace, our practice of politics. Its vision is of a holistic change in the way we do justice in the world (Zehr, 1995; Van Ness and Strong, 1997). This essay seeks to explain the principles of such holistic restorative justice at two levels. First, it considers holism at the meta level of what sort of theory is required. Are we looking for a jurisprudence of restorative justice, a criminology of restorative justice, or what? I argue for an ambitious long-term project of integrating explanatory and normative theories of restorative justice and explain how this differs from the projects of those attracted to competing intellectual traditions. Second, specific suggestions are advanced for values against which the accomplishments and disasters of restorative justice might be evaluated. More importantly, I seek to develop a methodology for progressively elaborating restorative justice values at the same time as we do empirical research that illuminates the implications of such value framing.

Restorative justice is about struggling against injustice in the most restorative way we can manage. So conceived, it targets injustice reduction; to see the goal simply as crime reduction impoverishes its mission. It aspires to offer practical guidance on how we can lead the good life as democratic citizens by struggling against injustice. It says we must conduct that struggle while seeking to dissuade hasty resort to punitive rectification or other forms of stigmatising response. Injustice and precipitate recourse to punitive rectification of it together help explain a great number of the deepest evils of contemporary life—war, terrorism, our (in)justice system—particularly its prison system, poverty, racism, sexism. All of these evils are at the same time instances of injustice and causes of it; poverty is itself unjust and a cause of countless other injustices. The social movement for restorative justice is important because it provides a fresh practical programme for combating injustice and stigmatisation. The programme is grounded in moral intuitions of considerable resonance for most people because they have a long history, particularly in the spirituality of the world's great religions.

Unlike many of the contributors to this volume, I do not see restorative justice embracing retribution, another intuition of great resonance and history. I part company with those who see punishment as a respectful way of raising our children, of dealing with criminals or with nations we disagree with. Compared with restorative dialogue, even non-restorative dialogue, punishment is less respectful. That is not to say we should never resort to it. But when we do it should be on consequentialist grounds—because there is no alternative way of resisting injustice. We should then do so as respectfully as we can, but without deluding ourselves that hitting or confining can be inherently respectful.

I. INSTITUTIONALISING CONSENSUS ON LIMITS

That said, I agree with many of the reasons my colleagues in this volume advance for retribution or just deserts as applied to criminal offenders. All the contributors here are reductionists on punishment. That means that I have much more in common with them than with the political leaders of the nations from which they come, perhaps with the noble exception of Leena Kurki's homeland of Finland, whose leaders seem admirably reductionist. While I submit that the persuasive and the right way to convince political leaders to be reductionists is to show them the terrible consequences prisons have for peoples' lives, I concede there is a story about how deontologists can be persuasive about reductionism.¹ All writers in this collection believe that unbreachable upper limits should be placed on the punishment that can be imposed for each type of crime, whether that punishment is imposed by a court or a restorative justice process. Moreover, they all believe that there should be substantial limits, so that severe punishments (such as any use of imprisonment) should be permissible only for serious crimes. They would all agree that longer terms of imprisonment to incapacitate repeat property offenders breach the kind of upper limits they favour. Many of them believe in these limits on desert grounds. I derive the need for their unbreachability from a republican philosophy of what justice requires—pursuit of non-domination (Braithwaite and Pettit, 1990; Pettit, 1997). The nub of this argument is that, by definition, citizens cannot enjoy a republican form of freedom in a society where they are insecure or uncertain about the limits on state coercive power and few limits of this kind could be more fundamental than precise limits on the length of prison terms.

There has been a long-running argument between, for example, Philip Pettit and myself on one side and Andrew von Hirsch and Andrew Ashworth on the other as to who has a philosophy that most robustly ties down the assurance that under no circumstance can it be viewed as morally right to breach those upper

¹ Deontologists believe in honouring certain constraints regardless of the consequences of doing so. Consequentialists, in contrast, seek to maximise certain good consequences. Some consequentialists, however, argue it is possible to give sound consequentialist justification for certain constraints.

constraints. They accuse us of being vulnerable to a moral imperative to breach them, when doing so would reduce the amount of domination in the world (von Hirsch, 1993). We deny this, advancing a conception of non-domination that implies a consequentialist justification for tying our hands against ever breaching certain constraints. We can also be correctly accused of advocating breach of what many retributivists view as proper lower constraints by advocating mercy as a value for those who 'deserve' punishment. We retort that when we more often grant mercy in cases where the retributivist must punish, then the retributivist will more often breach *upper* constraints because by punishing more often in a system prone to error the retributivist will more often make the error of punishing the innocent. We accuse retributivists of slipping in and out of conceiving just deserts, hard treatment, or censure as a good consequence, leaving them vulnerable to the conclusion that in some circumstances breaching an upper constraint is morally required to assure that desert or censure is not escaped.² Moreover, we say that if crime prevention is a general justifying aim of a criminal justice system, how can it be coherent to honour constraints that defeat the realisation of that overarching aim? They reply that it makes all the sense in the world to justify the existence of a system in a different manner from the way you make it work.

The point I want to advance is that we can disagree passionately on whose philosophy is more invulnerable to breach of upper constraints on punishment while agreeing that the politically important thing is to institutionalise laws and regulatory mechanisms that work to forbid the breach of (reduced) upper constraints.³ That requires respectful acknowledgement that both sides are intellectually serious about upper constraints and politically serious about working together to enforce them against judges and restorative justice processes. The important shared project is about how to make the regulatory mechanisms work. How do we fund youth advocacy groups to advise young people of their rights, to blow the whistle when a restorative justice conference imposes an outcome that is more punitive than a court would impose? How do we censure judges for overruling restorative justice outcomes as insufficiently punitive?

II. DEMOCRATIC PRAGMATISM

Here a feature of restorative justice of some importance is its democratic pragmatism. There is no blueprint for how an ideal restorative justice system should work.

² For example, if proportionate censure is conceived as what we are constrained to honour deontologically and hard treatment is conceived as necessary to achieve censure, then we are reasoning consequentially not about censure but about hard treatment as a means of securing censure. To that extent we are no less vulnerable to breaching hard treatment limits in pursuit of our obligation to censure than is a utilitarian in his pursuit of hard treatment to achieve the goal of crime prevention.

³ Here I assume that deontologists are willing to be consequentialist about making enforcement work to assure that upper constraints are honoured. Of course, that enforcement action must itself honour proper limits. At each level of this regress the republican theorist believes she can design a regulatory strategy which is maximally effective (at the first level for preventing the injustice, at the second

There are restorative values we discuss below. They inform a vision of a direction for reform. As is clear from the presentations of others in this volume, there can be considerable common ground with desert theorists about a wide variety of reforms that move in the same direction—upper constraints and human rights constraints and shifts from punitive to restorative practices. Those who insist on coalitions only with folk who share their philosophy fail to bring about change. One needs a theory of the good, and a theory of how you move from the bad to the good working with colleagues who share only parts of your vision of the good. One of the exciting things about restorative justice as an intellectual tradition is that it may be slowly developing a sophisticated theory of transition. For a consequentialist, one of the virtues of incremental transition is that it enables experimentation, innovation combined with evaluation. Empirical research conducted by a number of the contributors to this volume has refined in various ways how we should think of the good and bad consequences at issue with restorative justice. So restorative justice at the moment is an adventure of research and development, where the research is proving tremendously encouraging in some ways, discouraging in others. As we use empirical experience to repair this leaky ship at sea, we should be careful about being too sure about a plan for the voyage. Rather we should see ourselves as in a process of Research and Development toward one.

In the R & D process, we should be wary of the Russian capitalism fallacy. Research on the movement of Russia from communism to capitalism finds it to be a disaster; people are poorer under capitalism than under communism. The fallacy is to induce from this research, as some Russian patriots do, that communism is superior to capitalism. The sad thing about Russia is that it had devoted impressive intellectual energies to analysing the transition from capitalism to communism but had done little serious thinking about how to execute the transition from communism to capitalism. There are moments in transitions where you get the worst of both worlds. What is needed is a theory of transition that is

level for preventing breach of the constraint) while honouring appropriate limits. The retributive deontologist is pessimistic about this capability at the first level but seems to be an optimist at the second level. If one is a retributive deontologist at the first level, one must consider whether to also be a retributive deontologist at the second level. That is, do we impose a punishment proportionate to their wrongdoing on a person who has breached proper limits on punishment—be that person a judge, police officer, parent or citizen? What the consequentialist should do is regulate such conduct with the regulatory strategy best designed for achieving the good consequence of honouring the sentencing constraint, combating judicial corruption, regulating community stigmatisation or corporal punishment of offenders that exceeds acceptable limits. If the deontologist says no, what we must do is give the non-compliant judge or citizen the punishment she deserves, then the deontologist has done a worse job of honouring the first constraint than the consequentialist. On the other hand, the retributive deontologist might say, 'I am only constrained to dispense just deserts when enforcing the law against injustice. When enforcing the law which regulates this law enforcement I will be a consequentialist who seeks to maximise the honouring of proportionality constraints'. This second answer is the one the pragmatic consequentialist hopes for. Still the consequentialist must ask: 'What then will be your consequentialist theory in this second order enforcement task? How will it be secured against breach of proper constraints? And what is the reason you choose to regulate primary rule-breakers deontologically while regulating the regulation of rule-breaking (by judges, police, parents or citizens in a conference) consequentially?'

realistic about the persistence of the worst features of the old regime. People who persist in their belief in these terrible features need to be given some democratic space in which they can learn some of the merits of the alternative. This is very much the way restorative justice approaches the punitiveness of many people in restorative justice processes. There is no need to despair if a lot of people are highly punitive in restorative justice processes (Daly, this volume); it would be astounding if this did not happen. Reason for despair would be if restorative justice failed to help more of them become less punitive over time.

Citizen empowerment, I wish to argue, should be a higher-order value of restorative justice than, for example, non-punitiveness. Genuine empowerment means that the punitiveness of punitive people is not ruled out of order. Restorative justice allows punitive outcomes so long as they do not exceed upper constraints imposed by the law nor abuse fundamental human rights. The evidence is at the same time that restorative justice conferences help people to become less punitive (Braithwaite, 2002: chapter 3). This is what I mean by the democratic pragmatism of the restorative justice approach to transition. The analogy to electoral democracy is strong. Democrats do not resort to arms if a democratic electoral process leads to the election of an anti-democratic government. Rather they prefer to work towards the next election; meantime they try to mobilise constitutional constraints against anti-democratic shifts the elected tyrants seek to bring about.

The next section develops a little further the rudiments of why it makes sense to work toward a broad theory of restorative justice to inform how to struggle against all forms of injustice restoratively. The section deals with how the properties of such a theory will be different from the theories that emanate from extant theoretical traditions. Then in the following section we consider what are restorative values and how these should be prioritised.

III. THINKING THEORETICALLY ABOUT RESTORATIVE JUSTICE

My approach to the theory of restorative justice is to seek to develop explanatory and normative theories that inform each other. Explanatory theories are ordered sets of propositions about the way the world is, normative theories are ordered sets of propositions about the way the world ought to be. Elsewhere, with Christine Parker and Philip Pettit, I have attempted to argue, using restorative justice as an example, that the effort to integrate explanatory and normative theory gives promise of simultaneously improving both theories—increasing explanatory and normative power (Braithwaite and Parker, 1999; Braithwaite and Pettit, 2000). What we aspire to is the development and testing of explanatory theories of how to prevent injustice, normative theories of what it means to prevent injustice and how we ought to do so.

Such an aspiration is frustrated by a variety of more dominant intellectual traditions that will be briefly considered in turn. If there were an award for the

intellectual tradition least likely to nourish an integrated theory of restorative justice, the *philosophy of punishment* would surely be a contender. The philosophy of punishment is oriented to questions like: When should we punish? What is the right punishment? By this it means state punishment, mostly displaying a puzzling lack of interest in when it is appropriate for state versus non-state actors to do the punishing. The deepest problem with this tradition is that the answer to the question 'What is the right punishment?' will almost always be the wrong solution to the problem.

Jurisprudence is a broader tradition that considers a range of other remedies to a problem beyond punishment, though still mostly remedies at the level of state law. The trouble with jurisprudence from my perspective is that it is not interested in explanatory theory nor in testing empirical claims. Jurimetrics, the closest field of empirical study, has surprisingly little to do with jurisprudence. Jurisprudence is dominated by the discipline of philosophy which, according to millennial critics, had one of its weaker centuries in the twentieth. One reason suggested for this has been its retreat from the world of explaining social phenomena. This is one of the things that distinguishes great normative philosophers of previous centuries whose thought had an impact on historical events—like Mill, Bentham, Smith, Locke, Cicero, Aristotle—from the greatest philosophers of the twentieth century. The explanatory Smith of *The Wealth of Nations* is connected to the normative Smith of *The Theory of Moral Sentiments*. Contemporary economists read one and not the other; philosophers the reverse, to the mutual impoverishment of both disciplines.

Criminology is the contemporary discipline most systematically engaged with explanatory theory about injustice. Not only is it impoverished by substantial neglect of normative theory, it also tends to narrow the kind of injustice we are concerned about to crime. For any form of serious injustice, defining it as a crime and reacting to it in some way appropriate to that definition is only one of many options for countering the injustice. Regulation is a more fruitful research field because it does not assume crime to be the most productive or just way of viewing an injustice, nor does it assume that criminalisation will have relevance to its explanation. The most consequential questions about how to regulate injustice do not arise in the context of deciding how to deal with a criminal case that is being processed by the criminal justice system. They are questions about whether the injustice would be better addressed by a family, by providing economic incentives for just behaviour, by just speech, as opposed to criminalisation. A central claim about the importance of restorative justice is that it provides a method, a forum and a set of relevant values for making these more important judgements.

My prescription for restorative justice therefore is that it should not only be wary of these traditions, but actively liberate itself from their narrow strictures of evaluation. That said, the richest resources for restorative justice to draw upon in its own way are within these traditions. Criminal law jurisprudence, for example, has made a uniquely important contribution to our thinking about human rights precisely because of its obsession with punishment. It forbids punishing in certain

ways or beyond a certain level without the guarantee of specified procedural safeguards. So when citizens decide they would like to inflict a certain punishment on one of their number the court can step in and say: 'Yes, you can confiscate your son's access to the family car because he has been driving dangerously', or 'No, you cannot decide to imprison him'. If the dangerous driving is so terrible that this might be warranted, the allegations must first be proven to constitute a crime and then the crime must be demonstrated to be of a seriousness that allows the possibility of a prison sentence.

While there is a set of propositions that we are seeking to advance toward the building of normative and explanatory theories of regulating injustice restoratively, there is also a need to nest under these general theoretical aspirations a plethora of more specific theories. For example, how to prevent violence as a form of injustice requires many different specific theories. Family violence in indigenous communities demands a different theory from juvenile street violence. How to prevent violence between nations requires a different kind of theory from school bullying. For all these kinds of violence, however, there may be some recurrent explanations that account for violence in terms of failure of dialogue, in terms of domination, stigmatisation, disrespect begetting disrespect, unacknowledged shame, techniques that neutralise taboos against violence, and so on. It also seems that there is a meaningful sense in which constraints need to be properly applied to the regulation of all kinds of violence. Fundamental human rights as defined by the UN human rights instruments apply across all these areas of violence, though there is variation in which rights are more salient for different types of violence. For interpersonal criminal violence upper limits on prison terms that can be imposed are crucial. With violence between nations, the imperative limits are quite different—non-use of nuclear or biological weapons, no indiscriminate bombing of civilians, the Geneva Convention. And the institutions for regulating them are different—the UN Security Council, the European Union and NATO in Europe, shaming by NGOs like Amnesty and Human Rights Watch, and in future the International Criminal Court. The checks and balances against exceeding limits are quite different, but the claim that checks and balances can have explanatory power and should have normative force is a general claim. For a republican normative theorist, there is also a general assertion about who the regulatory community should be who exercises checks and balances against breaches of limits. It should be whichever community will be most effective at securing freedom as non-domination by making the checks and balances work in a decent way.

IV. VALUES

With values against which restorative justice should be evaluated, there are some general ones—like accountability—that must apply to restorative justice in all domains. But nested under the general values are more specific values that must be equally central in each specific regulatory context. So in regulating school

bullying, the educational development of children is a core value that must be protected in whatever decisions are made in a restorative justice process. In healing a civil war fought over religious differences, religious tolerance may be the more central value to be advanced by the settlement. Some critics of restorative justice see it as a problem that restorative justice theorists put forward a confusion of values. Just as in an instance of armed conflict between states it seems obvious that there are a lot of values at stake, so in a case of street violence it also seems true that there will be many values at issue. Philip Pettit and I have argued that these competing values can be balanced and rendered commensurable for purposes of practical reasoning by evaluating their priority according to how they contribute to advancing dominion or freedom as non-domination. But this is an overly abstract criterion for operationalisation in empirical studies of whether values are realised and for giving practical guidance to practitioners.

Heather Strang and I have argued that restorative justice ought to pass a restorative process test as well as a restorative values test (Braithwaite and Strang, 2000). Here I reformulate restorative processes as procedural values of restorative justice. Strictly they are according to Rokeach's (1968) leading formulation of the values concept. Rokeach distinguishes values that are ways of behaving (eg fairness, a procedural value) from values which are desirable end states of existence or goals in life (eg peace, happiness). When a great deal is at risk for the alleged perpetrator of injustice—for example, imprisonment—procedural values rise in importance compared to outcome values. When less is at risk, procedural assurance can be more minimal. So when a parent does no more than issue an informal warning to a child over a minor act of violence directed against a sibling, it may not be necessary to have all stakeholders in the room. Indeed the warning may be issued on the run while the family meal is being cooked. In contrast, if there is any prospect that the child might be removed from his family and placed in a state institution as a result of the violence, all family members, including grandparents and other extended family and loved ones who would be affected by the removal, should have their say on the alternatives. While procedural requirements for the 'corridor conferencing' (Morrison, 2001) a teacher does with students on the run may be minimal, we would still want to put a lot of effort into seeking to persuade teachers of the virtues of other restorative values in respect of corridor conferencing. The same applies to our efforts to heal victims of a crime or tort where the wrongdoer is not known.

Elsewhere, I have collected my preliminary suggestions for restorative values into three groups (Braithwaite, forthcoming). The first group comprises 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 realised, these must be. They are:

- Constraining Values
— 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.

*Non-domination*⁴: We do see a lot of domination in restorative processes, as in all spheres of social interaction. But a programme is not restorative if it fails to be active in preventing domination. Any attempt by a participant at a conference to silence or dominate another participant must be countered. This does not mean the conference convenor has to intervene. On the contrary, it is better if other stakeholders are given the space to speak up against dominating speech. But if domination persists and the stakeholders are afraid to confront it, then the convenor must confront it. Preferably gently: 'I think some of us would like to hear what Jane has to say in her own words.'

Often it is rather late for confronting domination once the restorative process is under way. Power imbalance is a structural phenomenon. It follows that restorative processes must be structured so as to minimise power imbalance. Young offenders must not be led into a situation where they are upbraided by a 'roomful of adults' (Haines, 1998). There must be adults who see themselves as having a responsibility to be advocates for the child, adults who will speak up. If this is not accomplished, a conference or circle can always be adjourned and reconvened with effective supporters of the child in the room. Similarly, we cannot tolerate the scenario of a dominating group of family violence offenders and their patriarchal defenders intimidating women and children who are victims into frightened silence. When risks of power imbalance are most acute our standards should expect of us a lot of preparatory work to restore balance both backstage and frontstage during the process. Organised advocacy groups have a particularly important role when power imbalances are most acute. These include women's and children's advocacy groups when family violence is at issue, environmental advocacy groups when crimes against the environment by powerful corporations are at issue.

Empowerment: Non-domination does imply empowerment. In case readers misread non-domination to be a passive value, empowerment has been explicitly

⁴ The next three pages of this paper draw upon Braithwaite (2002b) where a more detailed development of the argument is provided.

added to the list. Moreover, empowerment does the useful work discussed earlier; it trumps other values on our second and third list. For example, forgiveness is listed below. But if a victim rejects an apology, choosing to hate, the ideal is that the conference empowers them to do so. Empowerment takes precedence over forgiveness.

Honouring Limits: Enough said on this already. I simply add as someone who hypothesises that restorative justice processes have their positive effects through a dynamic of reintegrative shaming and work their most negative effects through stigmatisation, that it seems important to prohibit any degrading or humiliating form of treatment. We had a conference in Canberra where all the stakeholders agreed it was a good idea for a young offender to wear a T-shirt stating 'I am a thief'. This sort of outcome should be banned.

Respectful listening: Just as upper limits on sanctions constrain what citizens are empowered to decide in a restorative justice process, equally citizens are not empowered to howl others down. Respectful listening is a condition of participation; folk who persistently refuse to honour it should be asked to leave. It trumps empowerment of the one because it disables the empowerment of the many.

Equal concern for all stakeholders: Restorative justice programmes must be concerned with the needs and with the empowerment not only of offenders, but also of victims and affected communities. Programmes where victims are exploited as no more than props for the rehabilitation of offenders are morally unacceptable. Deals that are win-win for victims and offenders but where certain other members of the community are serious losers, worse losers whose perspective is not even heard, are morally unacceptable. Equal concern does not mean equal help. Help should vary according to need (Sullivan and Tift, 2001).

Accountability, appealability: Principals to any restorative justice process about a legally significant matter, not just criminal matters, should have a right to appeal the restorative resolution to a court of law and a right to resolve the dispute in a court of law in preference to a conference/circle. This is my most radical prescription. In an era where legal aid is contracting it seems piously undeliverable. Elsewhere I have argued, relying heavily on Christine Parker's (1999) work, for the kind of radical transformation of the entire legal system along restorative justice lines that would make it affordable (Braithwaite, 2002: chapter 8). Not all of the accountability mechanisms of criminal trials, however, seem appropriate to the philosophy of restorative justice. For example, if we are concerned about averting stigmatisation and assuring undominated dialogue, we may not want conferences or circles to be normally open to the public. But if that is our policy, it seems especially important for researchers, critics, journalists, political leaders, judges, colleagues from restorative justice programmes in other places, to be able to sit in on conferences or circles (with the permission of the participants) so there

can be informed public debate and exposure of inappropriate practices. Most importantly, it is critical that restorative justice processes can be observed by peer reviewers whose job it is to report on compliance with the kinds of standards under discussion here. It seems reasonable that offenders put into restorative justice programmes where any criminal sanctions are at risk be advised of their right to seek the advice of a lawyer on whether they should participate in the programme. Perhaps this would be an empty standard in poorer nations where lawyers are not in practical terms affordable or available for most criminal defendants. But wealthier nations can afford higher standards on this issue. Arresting police officers who refer cases to restorative justice processes should be required to provide a telephone number of a free legal advice line on whether agreeing to the restorative justice process is prudent.

Then in Braithwaite (2002b), I consider a second group of restorative justice values that 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 that new participants might be brought in to give these values more chance of realisation. While the second group includes values that can be trumped by empowerment, they are values against which the success of restorative processes can be evaluated. Moreover they are values around which the restoratist is democratically active, seeking to persuade the community that these are decent values. They include very basic kinds of restoration like restoration of property loss and emotional restoration, and more abstract ones like restoration of dignity, compassion and social support. They are all essentially different forms of healing/restoration. Prevention of further injustice is also an obvious and central principle. There are as many modalities of evaluation of the performance of programmes against this principle as there are forms of injustice. The one being most adequately researched at this time is prevention of future crime, an evaluation criterion that has shown progressively more encouraging results over the past three years (Braithwaite, 2002a: chapter 3). I will not detail or defend any list of principles here, as what I want to emphasise is the method for clarifying the principles of restorative justice. That method, we will see, implies revisability of any such list and local adaptation.

My proposal for an initial formulation of the values was influenced by two sources. First, I attempted to craft them as consensus principles by choosing values which are used to justify the international human rights in the above-mentioned treaties that have been ratified by most nations (see Braithwaite, 2002b). Secondly, I selected values from these consensus documents that also come up repeatedly in the empirical experience of what victims and offenders say they want in restorative justice processes in the criminal justice system (see Strang, 2000). They represent what restoring justice means for participants. The privileging of empowerment on the constraining list of values above means that participating citizens are given the power to tell their own stories in their own way to reveal whatever sense of injustice they wish to see repaired. At times this can involve an

utterly idiosyncratic conception of justice.⁵ Again this is the pragmatic democracy of the restorative tradition. Elsewhere, with Pettit and Parker, I have elucidated my own, perhaps idiosyncratic, conception of what justice entails—republican justice (for an overview see Braithwaite, 2002: chapters 4, 5). The paradox of being a republican is that your commitment to non-domination means that when you yourself participate in a restorative justice process you are obliged not to try to force republicanism down anyone's throat. You try respectfully to make the republican case for justice; sometimes you persuade, sometimes you fail—then as the pragmatic democrat you live with the decision.

Providing social support to develop human capabilities to the full is one particularly indispensable principle because it marks the need for a consideration of transforming as well as restoring or healing values. Providing social support to develop human capabilities to the full is a corrective to the concern that restorative justice may be used to restore an unjust status quo. The key design idea here is that regulatory institutions must be designed so as to nurture developmental institutions. Too often regulatory institutions stultify human capabilities, the design of punitive criminal justice systems being a classic example. Regulatory institutions cannot do the main work of social justice; developmental institutions of families, civil society (eg charities), schools, workplaces, state welfare and global institutions of redistribution, such as the IMF and World Bank, must be reformed to deliver that. Yet, as I have attempted to argue in more detail elsewhere, punitive justice is a great disabler of social justice—causing unemployment, debt, disease, drug addiction, suicide and racial degradation—whereas restorative justice can be an important enabler of social justice (Braithwaite, 2002: chapters 5, 7). In evaluation research that tests such a developmental principle, the test is not whether human capabilities actually are developed to the full as a result of a restorative justice process, but whether a restorative process leads us closer to this ideal rather than leading us away from it, and closer than non-restorative alternatives.

Then in Braithwaite (2002b), I develop a third priority list of values that includes remorse over injustice, apology, censure of the act, forgiveness of the person and mercy. This list differs from the second list of values in a conceptually important way. It is not that the list three values are less important than list two. When Desmond Tutu (1999) says *No Future Without Forgiveness*, many restorative justice advocates are inclined to agree. Forgiveness differs from, say, respectful listening as a value of restorative justice in the following sense. We actively seek to persuade participants that they ought to listen respectfully, but we do not urge them to forgive. It is cruel and wrong to expect a victim of crime to forgive. Apology, forgiveness and mercy are gifts; they only have meaning if they well up from a genuine desire in the person who forgives, apologises or grants mercy. Apart from it being

morally wrong to impose such an expectation, we would destroy the moral power of forgiveness, apology or mercy to invite participants in a restorative justice process to consider proffering it during the process. People take time to discover the emotional resources to give up such emotional gifts. It cannot, must not, be expected. Similarly remorse that is forced out of offenders has no restorative power. This is not to say that we should not write beautiful books like Tutu's on the grace that can be found through forgiveness. Nor does it preclude us evaluating restorative justice processes according to how much remorse, apology, forgiveness and mercy they elicit. Some might be puzzled as to why reintegrative shaming does not rate on my list of restorative values. It is not a value, not a good in itself; it is an explanatory dynamic that seeks to explain the conditions in which remorse, apology, censure of the act, forgiveness, mercy and many of the other values above occur. There is redundancy in listing remorse, apology and censure of the act because my theoretical position is that remorse and apology are the most powerful forms of censure of the act since they are uttered by the person with the strongest reasons for refusing to vindicate the victim by censuring the injustice. However, when remorse and apology are not elicited it is imperative for other participants to vindicate the victim by censuring the act.

Let us clarify finally the distinctions among these three lists of restorative values. List one are values that must be honoured and enforced as constraints; list two are values restorative justice advocates should actively encourage in restorative processes; list three are values we should not urge participants to manifest—they are emergent properties of a successful restorative justice process. If we try to make them happen, they will be less likely to happen in a meaningful way. Constraining values, maximising values and emergent values.

Many will still find these values vague, lacking specificity of guidance on how decent restorative practices should be run. That specificity will come from shared sensibilities acquired by swapping stories about the implementation of the values (Shearing and Erickson, 1991). Standards of the good must be broad if we are to avert legalistic regulation of restorative justice that is at odds with the philosophy of restorative justice. What we need is deliberative regulation where we are clear about the values we expect restorative justice to realise. Whether a restorative justice programme is up to standard is best settled in a series of regulatory conversations (Black, 1998) with peers and stakeholders rather than by rote application of a rulebook. A value like restoration of the environment will be relevant to the inspection of factories, but not normally to the regulation of delinquency, unless perhaps what the delinquent has done is to light a forest fire. That said, certain highly specific principles from our first list are so fundamental to justice that they must always be guaranteed—such as a right to appeal.

Yet some conventional rights, such as the right to a speedy trial as specified in the Beijing Rules for Juvenile Justice, can be questioned from a restorative perspective. One thing we have learnt from the victims movement in recent years is that when victims have been badly traumatised by a criminal offence, they often

⁵ Barbara Hudson's paper in this volume gives the most profound reason why it is necessary not to rule such idiosyncrasy out of order as not manifesting restorative values: '[W]hat matters is whether restorative justice can provide a better opportunity for victims to tell the story they want to tell, and for their story-telling to be effective'.

need a lot of time before they are ready to countenance healing. They should be given the right to that time so long as it is not used as an excuse for the arbitrary detention of a defendant who has not been proven guilty.

This is an illustration of why, at this point in history, we need to aim for just a framework agreement on standards for restorative justice that is mainly a set of values for framing quality assurance processes and accountability in our pursuit of continuous improvement in attaining restorative justice values. There is some hope that the Committee of Experts established in pursuance of the Declaration of Vienna from the UN Congress on the Prevention of Crime and the Treatment of Offenders, 2000 will accomplish precisely that at the international level.

V. BOTTOM-UP VALUE CLARIFICATION

At the local level what we need to think about is how to make the quality assurance processes and accountability work well. We don't have to wait for the United Nations for this. For top-down value clarification the kind of UN process Dan Van Ness and his NGOs colleagues triggered is ideal (see Van Ness, this volume). While the worry now is that it will be dominated by 'experts' and states, a methodology of the kind I have advanced—informing the list of values (or principles or standards as the UN might prefer) by existing UN human rights accords and also by empirical research on what victims, offenders and their families say they want out of restorative justice processes—seems democratically defensible at the international level. The UN human rights accords have perhaps more than any other UN instruments been shaped by an inclusive, hotly contested dialogue (witness the 'Asian values' debate) over more than 50 years, thanks to the inspiring initial leadership of the regime by Eleanor Roosevelt. NGOs from many nations have participated in it; even the most oppressed political prisoners have had a voice through Amnesty and like organisations. And of course the rights enshrined in the world's many legal systems were put into contest in that dialogue. As comforting as that is, our objective now must be to connect this top-down process to a rich plurality of bottom-up value clarification processes.

A local restorative justice initiative can take a very broad list of values, such as the ones I have tentatively advanced, or preferably the ones that emerge from the UN dialogue, and use them as the starting point for a debate on what standards they want to see accomplished in their programme. A few discussion circles with all the stakeholders in the programme may be enough to reach a sufficient level of shared sensibility to make quality assurance and accountability work. Not every contested value or right has to be settled and written down. The unsettled ones can be earmarked for special observation in the hope that experiential learning will persuade one side of the debate to change their view (or all sides to discover a new synthesis of views).

The drafting of local charters for restorative justice programmes that have emerged from civil society in Northern Ireland (see Braithwaite, 2002b), is

consistent with the approach commended here. There are a lot of similarities between these principles emerging from the Loyalist and Republican communities; it was a moving experience in Belfast in 2000 to see ordinary citizens and former combatants with diametrically opposed visions for the future of their country discover through dialogue that they shared a great number of restorative values. Statements such as the 'Standards and Values of Restorative Justice Practice' of Community Restorative Justice Ireland (from the Republican side) also has some distinctively interesting ways of framing standards, such as 'flexibility of approach' and 'evaluation.' There is also indigenous distinctiveness in the proposal that key elements of the charters 'are slated to appear as large murals at strategic locations, in spaces that have traditionally been reserved for the political iconography that is well known within and outside Northern Ireland.' (Mika and McEvoy, 2000). For all the local distinctiveness, both the Republican and Loyalist charters have values that sit comfortably beside the values I have derived from the UN human rights instruments and beside those that the Northern Ireland Office has derived from European human rights instruments (for example, in Restorative Justice and a Partnership Against Crime, 1998). Once there has been a preliminary discussion of the principles, standards and rights a local programme should honour, training is needed for all new restorative justice convenors to deepen the furrows of shared sensibility around them. Training carries a risk of professionalisation. This risk can be to some extent countered by making the training participatory, by giving trainees the power to reframe the curriculum. Elsewhere I have sought to develop in a little more detail how to resolve the contested values that emerge bottom-up through reflexive praxis—restorative justice practice that reflects back on its starting assumptions (Braithwaite, 2002b). Peer review—sitting in on one another's programmes and reflecting back constructive critique—is the key element of this reflexive praxis.

For republicans, bottom-up values clarification that actively involves disempowered people is superior to the imposition of a unicultural, univocal set of narrow legal values backed by a Diceyan conception of the sovereignty of parliament. As Christine Parker and I have argued elsewhere (Braithwaite and Parker, 1999), we need to restructure the rule of law by allowing the justice of the people to bubble up to reshape the justice of the law. That done, the justice of the law can then more legitimately constrain the justice of the people. This is particularly true in former colonies such as my own. Our criminal law, for example, was inherited almost entirely from England without any local debate, least of all from the prior Aboriginal owners of the continent. One reason that North Atlantic legal traditions should not be granted the legitimacy they are in a nation like Australia is that they were used to justify stealing the land from its owners, stealing children from their mothers, making Aboriginal elders trespassers on their own cultures and causing an epidemic of Aboriginal deaths in custody through infliction upon them of the Western institution of the prison.

The colonialism that concerns me about the retributive Anglo-American jurisprudence that was imposed on my land is not just a fact of our dim past. The

most important recent change in our criminal law arose against a background of threat of coercive trade sanctions from the United States and the European Union. This criminalises a wide variety of intellectual property appropriations that were formerly torts, as well as extending the duration of patents and other intellectual property monopolies in knowledge. There is no way an undominated dialogue among Australian citizens would have led to the view that such criminalisation should occur or that substantial police resources should be diverted to enforcing these laws (as has occurred). As an intellectual property importing country—unlike net exporters such as the US, UK and Germany—we have no national economic interest in such laws. They are laws that have made us poorer and less free. Of course, the consequences for us have been minor compared to AIDS-ravaged nations in Africa that have been mercilessly threatened with litigation, trade sanctions and withdrawal of aid for importing generic AIDS drugs from India. The appropriation of seeds, medicines and other products of the indigenous cultures of the South by the multinational corporations of the North and then the imposition of new Northern laws to punish violators is making us all trespassers on our own cultures (Drahos with Braithwaite, 2002). China has been executing intellectual property ‘pirates’ as part of its campaign to gain admission to the World Trade Organisation. Republican justice, I submit, would quickly feed back the view that these kinds of laws enjoy no legitimacy with the people and would never be enforced by an undominated restorative justice process. Under a Diceyan view of parliamentary sovereignty, of course, the laws and enforcement practices enacted by colonised parliaments on behalf of the US-EU intellectual property order are legitimate.

VI. TRANSCENDING NORTH ATLANTIC JURISPRUDENCE

The greatest hope for forging productive new modalities of restorative jurisprudence lies beyond the North Atlantic core of the world system, all of which as part of Christendom fell victim to the ‘theft’ (Christie, 1977) of citizens’ disputing first by the church under Canon Law and then by kings who turned what once were sins against god into felonies, failures of fealty to their king. Conceiving crime as an offence against the crown is a peculiarly obscure idea to have been taken seriously by the intellectuals of the North Atlantic for all these centuries. Of course it is wrong to see Northern jurists as irredeemably fettered to being accomplices of this old project of their kings to dominate their peoples. On a wide front now, there is a problem-solving movement internal to North Atlantic traditions that Susan Daicoff (2002) has recently referred to as the comprehensive movement in law. It includes holistic lawyering, restorative justice, collaborative law, therapeutic jurisprudence, transformative mediation, procedural justice and preventive law, among other movements of the 1990s. Notwithstanding this North Atlantic legal ferment, my analysis is that the greatest hope for the radical transformation advocated here is in the South and East. At the time of writing,

the South African parliament is debating a bill that would see *ubuntu*, a profoundly restorative and developmental ideal of human relationships, as the most fundamental guiding value of its juvenile justice system. Already South Africa has the most inspiring constitution in the world, one that incorporates many of the values discussed above, a Constitution used by the community peacemaking committees that Clifford Shearing has worked with in South Africa to guide and constrain their day to day peacemaking practices (Shearing, 2001; Roche, 2001).

There is much that all the world’s peoples have learnt from European and North American liberal legalism. The ideas of legal rights, of having a criminal law that is distinguished from tort or delicts, have proved particularly important and useful for securing freedom as non-domination. But there are many features of it we should reject. One is the unicultural one-size-fits-all vision of law we have already discussed. Unlike some restorative justice advocates I suspect we should totally reject proportionality as a criminal law doctrine. We should abolish just deserts, retribution and stigma as doctrines. While I do not think we should totally abolish *mens rea* and intention as the fundamental doctrines that guide the allocation of criminal responsibility, such causal notions of fault should be relegated to a subsidiary role. Reactive fault (Fisse, 1983) is more useful for guiding a more restorative vision of responsibility, that empowers a more active kind of responsibility that citizens take, compared with the passive kind of Western criminal responsibility to which citizens are held (Braithwaite and Roche, 2000). Here Asian legal traditions are a more useful resource than Western ones.

As argued earlier, we can agree with the laudable objectives that motivate liberal desert theorists and at that level we can work together to realise them. More than that, I see no consequentialist dangers whatsoever in the formulation of retribution and proportionality advanced by Antony Duff when articulated in the following way in his essay for this volume:

So whilst on this account we should not seek a strict proportionality between crime and reparation, or make proportionality our positive aim, we must respect the demands of a rough and negative proportionality: the reparation must not be *disproportionate* in its severity to the seriousness of the crime (p 57).

Retribution, just deserts and proportionality hold no dangers as doctrines so long as they explicitly rule out the legitimacy of the argument that a person should be put in prison for no better reason than that a failure to do so would be disproportionately lenient. Unfortunately, however, the Western legal tradition is for judges to give these concepts a meaning that does require them to imprison offenders when a failure to punish (or to punish severely) for a serious crime would be regarded as disproportionately lenient. We have seen appellate courts reason in just this way when they overturn decisions of restorative justice conferences as insufficiently punitive in cases like *Clotworthy*.⁶ As Declan Roche (2001: 151) found in his study of accountability in 24 restorative justice programmes in six countries:

⁶ *The Queen v Patrick Dale Clotworthy*, Auckland District Court T 971545, Court of Appeal of New Zealand, CA 114/98.

... internal review mechanisms generally intervene to prevent outcomes that are too harsh, while external mechanisms generally intervene to prevent outcomes that are too lenient. In other words, internal review mechanisms tend to enforce upper limits, while external mechanisms enforce lower ones.

Notwithstanding Antony Duff's careful limiting of proportionality to negative proportionality in his statement above, we should not be surprised if the average judge inferred from the following statement from the same paper an obligation of positive proportionality as well:

I will argue, however, that the retributivist slogan—that 'the guilty deserve to suffer'—does express an important moral truth; and that in the case of the criminally guilty it is the state's proper task to seek to ensure that they suffer as they deserve (p 48).

One whose central philosophical commitment is to freedom as non-domination must reject any such moral truth. More pragmatically, desert will have evil consequences if this conception of it is read as requiring imprisonment to honour it. In my country judges have interpreted their obligation to honour it as requiring sentencing of Aboriginal offenders to prison for very serious crimes when their people reject the justice of the prison as an institution, when imprisonment is viewed by them as something that removes them from spiritual contact with their traditional lands, sealing them off from any prospect of healing, thereby causing a high risk of suicide. Could an injustice be more profound? My plea to liberal retributivists would be that they be much more explicit in laying out how and why their position does not require putting a person in prison no matter how serious their crime. Indeed, why their position forbids any punishment being imposed for no better reason than to honour positive proportionality.

Until there is professional and popular clarity of understanding that retribution means upper limits while making the enforcement of lower limits on punishment an evil, the marriage of retribution and restorative justice is not a wedding we should want to attend.

VII. CONCLUSION

In this essay I have striven to conceive of restorative justice as a more ambitious project intellectually and politically than it is normally conceived. A republican case has been made for a set of limits upon restorative justice grounded in international human rights instruments. A beginning set of values we might seek to maximise through restorative justice has also been discussed based on an interplay between the values found in those human rights documents and the values revealed by empirical research on the aspirations of participants in restorative justice processes. A second reflexive methodology was then discussed for a more bottom-up generation of restorative justice values. Between these two methodologies the long-run hope is for a radical redesign of legal institutions whereby the justice of the people will more meaningfully bubble up into the justice of the law and the justice of the law will more legitimately filter down to place limits on the justice of the people.

Such a radical redesign project will be less democratically meaningful if it is restricted to a single area of law like criminal law. While the social movement for restorative justice of the 1990s has grown as a criminal justice reform coalition, restorative justice values have a longer history in the peace movement and in movements for democratising workplaces (industrial democracy) and democratising schools. Moreover, there is an obvious opportunity and challenge in linking the idea of regulating injustice restoratively to the aspirations of the women's movement to democratise family life and Indigenous rights movements for self-determination over their lives. Family, school, workplace, tribe, community and international relations all seem sites of restorative justice of comparable importance to law. Moreover the really interesting questions for both explanatory and normative theory seem to be about how the semi-autonomy (Moore, 1978) of say family and law, warfare and the International Criminal Court, are established (and should be established).

More broadly still, restorative justice can make a contribution to the institutional rethinking currently emerging under the rubrics of deliberative or discursive democracy. With a few exceptions, such as Fishkin's work on deliberative polling (Fishkin and Luskin, 1999), that tradition seems impoverished by an excess of political theory abstraction and a want of empirical research that dissects the speech conditions that nurture and discourage empowerment, procedural and substantive justice, equal concern for participants, accountability and competence in actually solving real problems like crime. The exciting combinations of micro-macro theory and rigorous empirical methods now being broached by restorative justice scholars should become a sophisticated resource for scholars of deliberative democracy. If the failure of the political theory of deliberative democracy is that it is too macro, the failure of theory and research on restorative justice has been that of being too micro. That deficiency is the one for which I have attempted to take some faltering steps toward remedy.

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2

Specifying Aims and Limits for Restorative Justice: A 'Making Amends' Model?*

Andrew von Hirsch, Andrew Ashworth and Clifford Shearing

I. INTRODUCTION

This paper explores the feasibility of clarifying aims and limits for Restorative Justice (hereafter, 'RJ'). It brings together three authors, two of whom (von Hirsch and Ashworth) have been associated with desert-oriented approaches to sentencing, and a third (Shearing) who has been exploring alternatives to traditional criminal-justice processes.

The essay proceeds by sketching a particular RJ model, which we shall term the 'making amends' model. We will describe the model, and then try to draw out some of its implications—regarding the scope of the model's application, modalities and techniques for achieving the model's ends, criteria for evaluating success or failure, and possible requirements regarding proportionality. We shall then examine two ways in which such a model might be implemented: first, ambitiously, as a comprehensive sanctioning approach designed largely to replace traditional criminal justice; and second, more modestly, as a scheme for a specified range of cases, within the broader framework of a proportionality-oriented sentencing system.

We make no ambitious claims for this 'making amends' model: at best, it will reflect some (albeit not all) of the aims discussed in the RJ literature. Moreover, we are not ourselves advocating this model here; rather, we wish to make heuristic use of it, to suggest how RJ's aims and limits might be specified more clearly.

Our approach will mainly be conceptual: we will be examining RJ as a set of ideas about dealing with offending. None of the authors deem themselves expert on RJ practice in various jurisdictions, and it is theory not practice that primarily concerns us. Our theoretical emphasis reflects our view that it is the aims and limits of RJ that are particularly in need of clarification. Because of this theoretical emphasis, we will be dealing with 'ideal' models—that is, models that are

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