

IN SEARCH OF RESTORATIVE
JURISPRUDENCE*John Braithwaite*

THE RESTORATIVE CONSENSUS ON LIMITS

It is of course far too early to articulate a jurisprudence of restorative justice. Innovation in restorative practices continues apace. The best programmes today are very different from best practice a decade ago. As usual, practice is ahead of theory. The newer the ideas, the less research and development (R&D) there has been around them.

Within the social movement for restorative justice, there is and always has been absolute consensus on one jurisprudential issue. This is that restorative justice processes should never exceed the upper limits on punishment enforced by the courts for the criminal offence under consideration. Retributive theorists often pretend in their writing that this is not the case, but when they do, they are unable to cite any scholarly writings, any restorative justice legislation or any training manuals of restorative justice practitioners to substantiate loose rhetoric about restorative justice being against upper limits or uncommitted to them. Moreover, the empirical experience of the courts intervening to overturn the decisions of restorative justice processes, which has now been considerable, particularly in New Zealand and Canada, has been overwhelmingly in the direction of the courts increasing the punitiveness of agreements reached between victims, offenders and other stakeholders. In New Zealand, for example, Maxwell and Morris (1993) report that while courts ratified conference decisions 81 per cent of the time, when they did change them, for every case where they reduced the punitiveness of the order there were eight where they increased it. Similar results have been obtained in the Restorative Resolutions project for adult offenders in Manitoba (83 per cent judicial ratification of plans, with five times as much modification by addition of requirements as modification by deletion) (Bonta *et al.* 1998: 16). While there were no

cases where the restorative process recommended imprisonment and the court overruled this, there were many of the court overruling the process by adding prison time to the sentence.

Retributivist voices have been absent in condemnation of excesses of courts in overturning non-punitive restorative justice outcomes while persisting with rhetoric on the disrespect of restorative justice for upper limits. I suspect this is not a matter of bad faith on their part, but simply a result of their acceptance of a false assumption that the problem will turn out to be one of punitive populism as the driver of punitive excess.

Secondly, there is near universal consensus among restorative justice advocates that fundamental human rights ought to be respected in restorative justice processes. The argument is about what that list of rights ought to be. I have suggested that there could be consensus on respect for the fundamental human rights specified in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Second Optional Protocol, the United Nations Declaration on the Elimination of Violence Against Women and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Braithwaite 2002b). While restorative justice advocates would agree that it can never be right to send an offender to a prison where his fundamental human rights are not protected, in Australia there is never likely to be consensus on whether it can be right to allow traditional Aboriginal spearing as an indigenous response to the problem of Aboriginal deaths in custody. The dilemma here is that for some traditional Aboriginal people in outback Australia, imprisonment is a fundamental assault on their human rights because it deprives them of spiritual contact with their land, which is everything to their humanity. When they feel strongly that ritualized spearing is less cruel and more reintegrative than imprisonment, little wonder that here it is difficult for westerners to be sure about what is right.

Basically, however, the restorative justice consensus on limits and rights is very similar to the retributive consensus: there ought to be upper limits on punishment, while there is disagreement on what should be the quantum of those upper limits, and fundamental human rights should constrain what is permissible in justice processes, with disagreements about what some of those rights should be and how they should be framed.

FERMENT ON PROPORTIONALITY

Where there is both strong disagreement between restorativists and retributivists, and among restorativists themselves, is on proportionality. Some restorativists are attracted to calibrating the proportionality of restorative agreements in terms of whether the repair is proportional to the harm done. This cuts no ice with retributivists who see this as a tort-based form of proportionality. For retributivists, punishment must be proportional to culpability. The harm in need of repair is only one component of culpability. An attempted murder where no one is hit by the bullet is more culpable than injuring

someone seriously as a result of unintentionally or slightly exceeding the speed limit. Such restorative proportionality is also unattractive to cultures who seek healing by allowing victims to give a gift to the offender (for examples, see Braithwaite 2002a: Box 3.3). The grace that comes from such gift-giving by victims can be helpful for their own healing and trigger remorse in offenders. It might be nurtured as a practice attractive to a number of cultural groups present in Western societies, not condemned as negative proportionality when what is required is positive proportionality.

For my part, I am not attracted to any conception of proportionality in restorative justice programmes. Limits are essential, but an upper constraint is quite a different matter from believing that the amount of punishment or repair ought in some way to be proportional to the seriousness of the crime. It may be that an underlying difference between retributivists and people like myself is that while retributivists tend to be deeply pessimistic that whatever the justice system does will make little difference to the safety of people. In contrast, my theoretical position is that poorly designed criminal justice interventions can make the community considerably less safe and well designed ones can help make it much safer. While it seems true that most attempts to reduce crime through restorative justice, rehabilitation, deterrence and incapacitation fail in the majority of cases where each is attempted, it is also true that all of these things succeed often enough for it to be true that there are cost-effective ways of reducing crime through best-practice restorative, rehabilitative, deterrence and incapacitative programmes. More importantly, I am an optimist that through programmes of rigorous research we can learn how to design a criminal justice system that has places for restorative justice, rehabilitation, deterrence and incapacitation that cover the weaknesses of one paradigm with the strengths of another. Through openness to innovation and evaluation, it should be quite possible for us to craft a criminal justice system that is both more decent in respecting rights and limits and more effective in creating community safety.

There is no evidence that upper limits inhibit this R&D aspiration. If they did, from my republican perspective we would have to scale back our aspirations (see Braithwaite and Pettit 1990). But there is no dilemma here. It is not true that if only we could execute murderers, or boil them in oil, we could reduce the homicide rate. There is no reason for thinking that we could reduce crime by locking up first-time juvenile shoplifters for five years. If it reduced shoplifting without generating subcultural defiance, it would only do so by shifting resources away from combating much more serious crimes.

Unlike upper limits, proportionality is an obstacle to crime prevention. In my corporate crime work, I believe I have shown persuasively that mercy for corporate criminals (disproportionate leniency) is often important for making the community safer (see Braithwaite 1984, 1985; Braithwaite and Pettit 1990). That is why corporate regulators have policies that they inelegantly call leniency policies. Regulators routinely face a choice between the out and out warfare of a criminal prosecution aimed at incarcerating the CEO and cutting a deal where the company agrees to increasing its investment in safety, internal discipline, staff retraining, in internal compliance systems and industry-wide compliance systems, and to compensation to victims in return for dropping

criminal charges against top management. Or the individual penalties are reduced in a plea agreement that keeps top management out of prison. The reason this mercy works is that the power of major corporate criminals for ill is matched by their power for good. The consequentialist impulse is to harness that power for good. Once we have done that, we must be troubled by the fact that while power is the reason we let the white corporate criminal free, it is also the reason we lock up the black street criminal. The social movement for restorative justice here might set as its aspiration showing the path to progressively reduce the incarceration of the poor in a way that increases community safety. This is no less plausible a policy idea than largely dispensing with the incarceration of corporate criminals in a way that increases community safety.

Obviously, we can never hope to do either if we are morally constrained in both domains to inflict punishment proportional to the wrongdoing. Many retributivists are attracted to Hart's (1968) move of seeing consequentialist considerations as general justifying aims of having a criminal justice system, but proportionality as a principle that should guide the distribution of punishments. A justifying principle that is consequentialist; a distributive one that is retributive. This is the formulation that appeals to von Hirsch (1993), for example. But what if I am right that proportionality destroys our capacity to experiment with crime prevention programmes that sometimes grant mercy, sometimes not, depending on the responsiveness of offenders to reform and repair, or depending on the agreement of victims and other stakeholders in restorative processes that this responsiveness justifies mercy? If I am right that often it will prove to be in the interests of community safety to give offenders other than a proportionate punishment, the Hartian principle of distributing punishment will defeat the general justifying aim of having an institution of punishment. That is, if we honour the distributive principle of proportionality, we will increase crime. The effect of the distribution will be to defeat the aim of establishing the punitive institution. The Hartian move of separating justifying and distributive principles is incoherent. It is only rendered coherent by the empirical assumptions that punishment reduces crime, and that while excessive punishment might reduce crime even more, we must place proportionality constraints on the pursuit of that good.¹ That is, the general justifying aim is to reduce crime through punishment. While we might achieve that aim even more through disproportionately heavy punishment, we still achieve it by proportionate punishment. If, on the other hand, these empirical assumptions fall apart in the way I suggest, then the distributive principle actually defeats the justifying aim of reducing crime (instead of simply limiting it).

Proportionality is a hot issue with surveillance and policing, just as it is with 'sentencing'. Just as there is a liberal impulse for equal punishment for equal wrongs, there is also the compelling intuition that black people should not be subject to more police

¹ A restorative theory of deterrence (see Braithwaite 2002a: Chapter 4) suggests that the Hartian assumptions are wrong. Empirically, there is now a lot of evidence that increasing punishment produces both increasing deterrence and increasing defiance (or reactance) effects (Sherman 1993; Brehm and Brehm 1981). Where the defiance effect is stronger than the deterrence effect, higher penalties increase crime. In their meta-analysis of correctional studies, Cullen and Gendreau (2000) found that the punitive severity of sentences actually had a small positive coefficient—more punishment, more reoffending.

surveillance than white people. This is the dilemma in US cities where Compstat computer targeting of crime hotspots for special police surveillance both seems able to reduce serious crimes like gun homicides and disproportionately targets black people (Sherman 1998).

Here I think there are lessons for restorative justice jurisprudence in the contrast between the Boston and New York police targeting of recent years, both of which make some plausible claims for reducing crime through improved targeting (Berrien and Winship 2000). In early 1999, both law enforcement officials and community members became greatly concerned at the shocking number of violent incidents in Boston's Cape Verdean community. The police believed they knew who were the gangs behind the violence. They believed they 'had the right guys' each of whom they could take out with several charges for offences not necessarily having anything to do with the violence (Berrien and Winship 2000: 30). They also wanted to do an Immigration and Naturalization Service sweep, with the threat of deportation for certain youths, unless the gang violence threatening the community stopped. Such an aggressive targeted swoop on a non-white community was obviously controversial and open to the interpretation of being racist. But what the lead police officer did was consult with both city-wide leaders of colour who had been critical of the police in the past for racist enforcement and consulted with the local Cape Verdean community. The police would not go ahead with this aggressive targeting unless it would be well received by the affected community. In the event, locals did seem so fed up with the violence that they wanted decisive policing. The targeting was of course still controversial, but it occurred with considerable local buy-in and it did not come as a shock to the local community when these young people were targeted. As far as I understand the case, limits and fundamental human rights were not breached. People were charged with offences they had actually committed. What is controversial is that many in white communities might have been targeted for the same kinds of offences. There are two relevant differences: the race difference and the fact that such a swoop in some other community that did not have the level of violence of the Cape Verdean community would not have picked up guns, would not have given a signal that might end gang violence. Police paralysis in the face of the moral dilemma seems a bad option. But a New York style police pounce aimed at reducing gun violence is also an inferior option to the Boston path of targeting combined with community consultation. While 'New York has gained national attention for dramatic reductions in violence... Boston has found a way to achieve dramatic reductions in violent crime while making equally strong efforts to build partnerships with the community' (Berrien and Winship 2000: 32). A better option still than the Boston approach might involve consultation with the community followed by offering the targeted youths an option of a restorative community justice process as an alternative to incarceration (see Braithwaite 2002a: Chapter 2).

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

THE JURISPRUDENCE OF RESPONSIBILITY

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

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

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

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

This suggests a restorative justice that is about 'rebiographing', restorative storytelling that redefines an ethical conception of the self. Garfinkel (1956: 421-2) saw what was at issue in 'making good': 'the former identity stands as accidental; the new identity is the basic reality. What he is now is what, after all, he was all along.' So, Maruna found systematically that desisters from crime reverted to an unspoiled identity. Desisters had restoried themselves to believe that their formerly criminal self 'wasn't me'. The self that did it was in William James' terms, not the I (the self-as-subject, who acts) nor the Me (the self-as-object, that is acted upon), but what Petrunik and Shearing (1988) called the It, an alien source of action (Maruna 2001: 93). Restorative justice might learn from this

research how to help wrongdoers write their It out of the story of their true ethical identity. Maruna (2001: 13) also concluded that 'redemption rituals' as communal processes were important in this sense-making because desisting offenders often narrated the way their deviance had been decertified by important others such as family members or judges – the parent or policeman who said Johnny was now his old self. Howard Zehr (2002: 10) makes the point that whether we have victimized or been victimized, we need social support in the journey 'to re-narrate our stories so that they are no longer just about shame and humiliation but ultimately about dignity and triumph.'

Maruna (2001: 148) commends to us the Jesse Jackson slogan: 'You are not responsible for being down, but you are responsible for getting up.' In the all-too-common cases of children in poverty who have been physically or sexually abused, they do frequently feel that they are not responsible, that their life circumstances have condemned them to regular encounters with the criminal justice system. While there is moral peril in allowing the law to accept poverty as an excuse, an attraction of restorative justice is that it creates a space where it can be accepted as just for such victimized offenders to believe: 'I am one of the victims in this room. While I am not responsible for the abused life that led me into a life of crime on the streets, I am responsible for getting out of it and I am also responsible for helping this victim who has been hurt by my act.' Maruna (2001) found empirically that desisters from crime moved from 'contamination scripts' to 'redemption scripts' through just this kind of refusal to take responsibility for being down while accepting responsibility for getting up. In short, by accepting a jurisprudence of active responsibility, it may be that we can respond more compassionately to the injustices offenders have suffered while increasing community safety, instead of threatening community safety in the way implied by our moral hazard intuitions against allowing poverty as an excuse. Hence, when a woman like Yvonne Johnson has good reason for thinking that she has been the most profound victim of injustice in the events swirling around her, yet has remorse for her crimes, wants to do the best she can to right the wrongs of her past, help others to avoid that path themselves, why not let her keep the interpretation that she was not really responsible for her terrible circumstances, so long as she takes responsibility for getting out of them and for doing what she can to heal those she has hurt? Why not say, 'because you have acquitted your fault reactively, because you are not a danger but a blessing to others, go in peace.' Because you have taken active responsibility for making good, you will no longer be held responsible for any debt to the community. This links to the core restorative intuition that because crime hurts, justice should heal. And punishments that obstruct healing by insisting on adding more hurt to the world are not justice.

CONTEXTUAL JUSTICE, NOT CONSISTENT JUSTICE

Restorative processes put the problem in the centre of the circle, not the person (Melton 1995). The right punishment of the person according to some retributive theory will almost always be the wrong solution to the problem. By wrong I mean less

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

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

Retributive intuitions are that such contextual justice on both fronts is inferior to the consistent justice of equal punishment for equal wrongs. Rather restorative justice, as I have conceived it here, involves unequal punishment in response to unequal reactions (to unequal active responsibility). With restorative justice, a particular concern from the consistent punishment perspective is that whether you get a lighter or a harsher punishment will depend on how punitive or forgiving victims and others in the circle are. A rich victim might not need full compensation as desperately as a poor one. But that is part of the point for the restorativist. If the poor victim is in more desperate trouble then she has a greater need and it would be a greater injustice to fail to fully respond to it.³ For most of the great philosophers of the past, and for contemporarily influential ones such as Dworkin (1986) as well, fundamental to genuine justice is equal concern and equal respect for the needs of all of those hurt by an injustice. It follows that privileging equal punishment for offenders narrows us to concern for only one type of justice affecting one type of actor. Philosophers who take the equal application of rules very seriously in a wide

² The pyramid implies a willingness to abandon restorative justice in favour of more determinedly punitive justice primarily oriented to either deterrence or incapacitation when restorative justice fails (Braithwaite, 2002a: Ch. 2). It assumes that restorative justice will often fail and fail again and in such cases the safety of the community requires escalation to more punitive approaches. Even when this means imprisonment, however, restorative justice values should be given as much space as possible within the punitive justice institution. More importantly, however, responsive regulation means contextually responsive de-escalation back down the pyramid to restorative justice whenever punishment has succeeded in getting the safety concerns under control.

³ On the idea of a restorative justice philosophy based on responding to needs see Sullivan and Tiff (2001). See also the discussion in Braithwaite (2002a) of the compatibility between a concern with freedom as non-domination and the approach of Nussbaum (1995) of nurturing human capabilities.

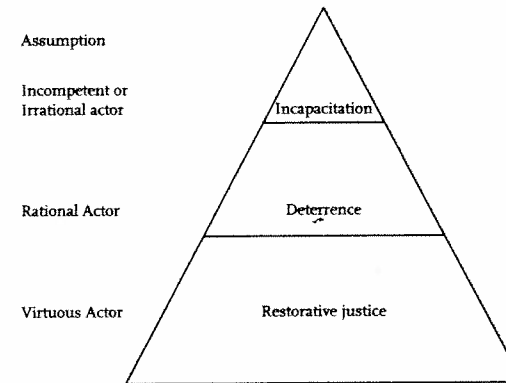


FIGURE 22.1. Toward an integration of restorative, deterrent and incapacitative justice.

range of contexts – from Cass Sunstein to Fred Schauer – are also clear that if we could perfect equal concern for all affected by an injustice we would not do it by enforcement of simple rules like equal punishment for equal wrongs. As Sunstein puts it: ‘If human frailties and institutional needs are put to one side, particularized judgments, based on the relevant features of the single case, represent the highest form of justice’ (Sunstein 1996: 135). And indeed the presumptive positivist Schauer argues even more emphatically:

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

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

equal punishment for equal wrongs. But this would distract me from my core point, which is that equal punishment for equal wrongs is a travesty of equal justice.

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

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

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

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

CLOTWORTHY

Mr. Clotworthy inflicted six stab wounds, which collapsed a lung and diaphragm, upon an attempted robbery victim. Justice Thorburn of the Auckland District Court imposed a 2 year prison sentence, which was suspended, a compensation order of \$15,000 to fund cosmetic surgery for an 'embarrassing scar' and 200 hours of community work. These had been agreed at a restorative conference organized by Justice Alternatives. The Judge found a basis for restorative justice in New Zealand law and placed weight on the wish of the victim for financial support for the cosmetic surgery and emotional support to end through forgiveness 'a festering agenda of vengeance or retribution in his heart against the prisoner'. The Court of Appeal allowed the victim to address it, whereupon the victim 'reiterated his previous stance, emphasising his wish to obtain funds for the necessary cosmetic surgery and his view that imprisonment would achieve nothing either for Mr. Clotworthy or for himself' (p.12). The victory for restorative justice was that 'substantial weight' was given by the court to the victim's belief that expiation had been agreed; their honours accepted that restorative justice had an important place in New Zealand sentencing law. The defeat was that greater weight was given to the empirical supposition that a custodial sentence would help 'deter others from such serious offending' (p.12). The suspending of the two year custodial sentence was quashed in favour of a sentence of four years and a \$5,000 compensation order (which had already been lodged with the court); the community service and payment of the remaining compensation were also quashed. The victim got neither his act of grace nor the money for the cosmetic surgery. Subsequently, for reasons unknown, the victim committed suicide, *The Queen v Patrick Dale Clotworthy*, Auckland District Court T. 971545, Court of Appeal of New Zealand, CA.

PRINCIPLES OF RESTORATIVE JUSTICE

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

What comes with civic republicanism is an approach to institutionalizing plurally deliberative justice under a rule of law and a separation of powers that accepts that citizens will often, indeed mostly, argue from a non-republican perspective. This is a great strength compared to retributivism or utilitarianism, which are stuck with the problem that if some judges are retributivists and some are utilitarians, the theory of the second best outcome is of a disastrous outcome. The republican argues for republican institutions and procedures without expecting that most people will manifest republican values within them. Sadly, sometimes they will be retributivists. But republicans must support giving voice to retributivists, indeed influence to them in deciding matters

in which they are stakeholders. They can join hands with retributivists in defending upper limits, respectful communication and fundamental human rights as the only limits restorativists would want to place on the sway of retributive arguments. So when a restorativist is deeply disturbed by the threat to dominion in the agreement proposed in a restorative justice conference, what she should do, and all she should do, after failing to persuade others that the agreement is unjust, is argue that there is no consensus on the agreement and, this being so, the matter should be sent to court.

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

Priority list of values 1

- Non-domination.
- Empowerment.
- Honouring legally specific upper limits on sanctions.
- Respectful listening.
- Equal concern for all stakeholders.
- Accountability, appealability.
- Respect for the fundamental human rights specified in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Second Optional Protocol, the United Nations Declaration on the Elimination of Violence Against Women and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

The second group of restorative justice values are values participants are empowered to ignore. Their being ignored is not reason for abandoning a restorative justice process.

It might, however, be reason for asking the participants to agree to an adjournment so new participants might be brought in to give these values more chance of realization. While the second group are values that can be trumped by empowerment, they are values against which the success of restorative processes must be evaluated. Moreover they are values around which the restorativist is democratically active, seeking to persuade the community that these are decent values.

Priority list of values 2

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

The third list are values that restorativists do not actively encourage participants to manifest in restorative justice processes. To urge people to apologize or forgive is wrong and cruel. These are gifts that have no power as gifts when they are demanded. Being on the third list does not mean they are less important values. It means they are values we promote simply by creating spaces where it is easy for people to manifest them.

Priority list of values 3

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

List 3 are emergent values, list 2 maximizing values, list 1 constraining values. What follows from the above is that the evaluation of restorative justice should occur along many dimensions. Narrowly evaluating restorative justice in terms of whether it reduces crime (the preeminent utilitarian concern) or honours limits

(the preeminent retributive concern), important as they are, are only two of 25 dimensions of evaluation considered important here. If 25 is too many, we can think of restorativists as concerned about securing freedom as non-domination through repair, transformation, empowerment with others, and limits on the exercise of power over others. From a civic republican perspective, the 25-value version, the four-value version and the one-value version (freedom as non-domination) are mutually compatible.

CONCLUSION

The point of jurisprudence is to guide us in how we ought to evaluate the justice of disputing practices. That also implies an obligation to be empirically serious in measuring performance against these evaluation criteria. The restorative justice research community has a long way to go before it can marshal empirical evidence on all the outcomes discussed in this essay. Yet in a short time, a considerable portfolio of studies of variable quality has been assembled. The critics of restorative justice have not been as empirically serious. A contribution of this chapter has been to illustrate how this has rendered their analyses myopic. One illustration is that retributive critics launch their attacks from an assumption that the disturbing problem will be victims insisting on excessive punishment. Yet the empirical reality is of courts insisting on overruling restorative processes that include victims for not being excessive enough in their punishment. Hartian critics assume that punishment is justified because it reduces crime, and that this is still true of punishing proportionately. Yet empirically punishment often increases crime in a way that makes it plausible that we can reduce crime by abandoning proportionality (while maintaining upper limits). The possibility of this empirical conjuncture is a blank page of the leading jurisprudential texts.

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

REFERENCES

- Ayres, I., and J. Braithwaite. 1992. *Responsive Regulation: Transcending the Deregulation Debate*. New York: Oxford University Press.
- Berrien, J., and C. Winship. 2000. "Lesson's Learned from Boston's Police-Community Collaboration." *Federal Probation* 63:25-33.
- Bonta, J., Rooney J., and S. Wallace-Capretta. 1998. *Restorative Justice: An Evaluation of the Restorative Resolutions Project*. Ottawa: Solicitor General Canada.
- Braithwaite, J. 1984. *Corporate Crime in the Pharmaceutical Industry*. London and Boston: Routledge and Kegan Paul.
- . 1985. *To Punish or Persuade: Enforcement of Coal Mine Safety*. Albany, NY: State University of New York Press.
- and D. Roche. 2000. "Responsibility and Restorative Justice." In *Restorative Community Justice*, edited by M. Schiff and G. Bazemore. Cincinnati, OH: Anderson.
- . 2002a. *Restorative Justice and Responsive Regulation*. New York: Oxford University Press.
- . 2002b. "Setting Standards for Restorative Justice." *British Journal of Criminology* 42:563-77.
- and P. Pettit. 1990. *Not Just Deserts: A Republican Theory of Criminal Justice*. Oxford: Oxford University Press.
- Brehm, S. S., and J. W. Brehm. 1981. *Psychological Reactance: A Theory of Freedom and Control*. New York: Academic Press.
- Cullen, F. T., and P. Gendreau. 2000. "Assessing Correctional Rehabilitation: Policy, Practice, and Prospects." In *Changes in Decision Making and Discretion in the Criminal Justice System*, vol. 3, edited by J. Horney. Washington, D.C.: U.S. Department of Justice.
- Dworkin, R. 1986. *Law's Empire*. Cambridge, MA: Harvard University Press.
- Fisse, B. 1983. "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions." *Southern California Law Review* 56:1141-246.
- Garfinkel, H. 1956. "Conditions for Successful Degradation Ceremonies." *American Journal of Sociology* 61:420-24.
- Hart, H.L.A. 1968. "Prolegomenon to the Principles of Punishment." *Punishment and Responsibility*. Oxford: Oxford University Press.
- Luna, E. 2002. "Punishment Theory and the Holistic Process." *University of Utah Law Review*.
- Maruna, S. 2001. *Making Good: How Ex-Convicts Reform and Rebuild Their Lives*. Washington, D.C.: American Psychological Association.
- Maxwell, G., and A. Morris. 1993. *Family, Victims and Culture: Youth Justice in New Zealand*. Wellington, New Zealand: Social Policy Agency and Institute of Criminology, Victoria University.
- Melton, A. P. 1995. "Indigenous Justice Systems and Tribal Society." *Judicature* 79:126.
- Nussbaum, M. 1995. "Human Capabilities: Female Human Beings." In *Women, Culture, and Development*, edited by M.C. Nussbaum and J. Glover. Oxford: Clarendon Press.
- Petrunik, M. G. and C. Shearing. 1988. "The 'I,' the 'Me,' and the 'It': Moving beyond the Meadian conception of self." *Canadian Journal of Sociology* 13(4):435-48.
- Schauer, F. 1991. *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*. Oxford: Clarendon Press.
- Sherman, L. W. 1993. "Defiance, Deterrence and Irrelevance: A Theory of the Criminal Sanction." *Journal of Research in Crime and Delinquency* 30:445-73.

- Sherman, L. W. 2000. "American Policing." In *The Handbook of Crime and Punishment*. New York: Oxford University Press.
- Sullivan, D., and L. Tift. 2001. *Restorative Justice: Healing the Foundations of our Everyday Lives*. Monsey, NY: Willow Tree Press.
- Sunstein, C.R. 1996. *Legal Reasoning and Political Conflict*. New York: Oxford University Press.
- Van Ness, D. and K.H. Strong. 1997. *Restoring Justice*. Cincinnati, OH: Anderson.
- von Hirsch, A. 1993. *Censure and Sanctions*. Oxford: Clarendon Press.
- Walgrave, L. 2002. "Imposing Restoration Instead of Inflicting Pain: Reflections on the Judicial Reaction to Crime." In *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms*. Oxford: Hart Publishing.
- Wiebe, R., and Y. Johnson. 1998. *Stolen Life: The Journey of a Cree Woman*. Toronto: Alfred A. Knopf.
- Zehr, H. 1995. "Justice Paradigm Shift? Values and Visions in the Reform Process." *Mediation Quarterly* 12:207-16.
- . 2002. Paper presented at the Fourth International Conference on Restorative Justice, Tübingen, October 2000. In *Restorative Justice: Theoretical Foundations* edited by E. Weitekamp and H. J. Kerner. Cullumpton: Willan.

23

THE VIRTUES OF RESTORATIVE PROCESSES,
THE VICIES OF "RESTORATIVE JUSTICE"

Paul H. Robinson

This Symposium is important for its ability to make better known the great benefits in the use of restorative processes. Below, I try to summarize some of the many promising achievements of those processes, by which I mean to include such practices as victim-offender mediation, sentencing circles, and family-group conferences to name just the most common. While many people refer to such processes by the name "restorative justice," that term and its originators, in fact, have a more ambitious agenda than simply encouraging their use. But that agenda is not one that the frontline practitioners of restorative processes necessarily share. It is primarily an anti-justice agenda, which prompts impassioned opposition. In this brief Article I try to explain why this is so and why it need not be so. I argue that restorative processes can and should be used more widely in ways entirely consistent with doing justice, and that the best thing for the restorative processes movement would be to publicly disavow the anti-justice agenda of the restorative justice movement.

I. THE VIRTUES OF RESTORATIVE PROCESSES

First, let me speak to the virtues of restorative processes. Frankly, it is hard to see why anyone would oppose such practices. They have the potential to change an offender's perspective—to make them fully appreciate the human side of the harm they have done—which can change their behavior when an opportunity for crime arises in the future. They also have the potential to deter offenders. That is, to the extent that there is some discomfort to having family and friends brought together to discuss one's wrongdoing, the social discomfort and the risk to social relations can stimulate offenders to

avoid wrongdoing in the future. Restorative processes also provide an important mechanism of norm reinforcement. The concern of the people present makes clear to the offender—and to everyone present—the validity and importance of the norm violated. It is a unique opportunity for each person to see that other people share the norm, and it is that reinforcement that makes the norm stronger in the community. The power of such social influence on conduct ought not be underestimated. Social science studies increasingly suggest that it is the force of such social influence, more than the threat of official sanction by the criminal justice system, that induces law-abidingness. What could be better than a process that advances several crime control mechanisms at the same time: rehabilitation, deterrence, and norm reinforcement?

Finally, the restorative processes advance other valuable interests, beyond those normally held to be the charge of the criminal justice system: providing restitution to the victim (normally the charge of civil tort law); giving victims a direct involvement in the disposition process, thereby providing an emotional sense of restoration and justice done; and putting a human face on the offender, thereby reducing the victim's generalized fear of victimization and perhaps giving the victim some appreciation of how the circumstances may have brought the offender to commit the offense.

Other articles in this Symposium give us specific evidence and illustrations of the value of restorative processes. William Nugent reports a nine percent reduction in recidivism.¹ This is quite impressive when one considers how small the investment of resources is in restorative processes as compared to other programs that typically do little better. Barton Poulson finds that restorative processes do much more than reduce recidivism.² I note of particular importance its effect in making people feel better about the adjudication system—feeling that it is more fair and more likely to give an appropriate sanction³—because these effects can build the moral credibility and legitimacy of the system, which can produce its own significant crime control benefits.

As hinted above, social science data suggests the great power of social influence in gaining law-abidingness. Criminal law is not irrelevant to this influence: If law can earn a reputation of moral authority with the community, it can to some extent harness this power. John Darley and I suggest two kinds of mechanisms by which criminal law can have an effect.⁴ First, it can help shape—build up or tear down—social norms. We have recently seen such norm shifting, as in the increasing opposition to domestic violence and drunk driving and decreasing opposition to same-sex intercourse. These changes did not come about because of changes in criminal law, but criminal law changes played an important role in reinforcing the change in norms. Second,

¹ See William Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 163.

² See Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, *passim*.

³ See *id.* at 192–93. Also recall Kathy Elton's moving accounts—such as her story about the Christmas presents stolen by a neighborhood youth, which frightened so many, but which, in the end, produced a positive good of greater understanding and closer relationships—of how restorative processes could work so effectively on so many levels. Kathy Elton & Michelle M. Roybal, *Restoration, A Component of Justice*, 2003 UTAH L. REV. 43, 53 B-57.

⁴ See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. REV. 453, 471–77 (1997).

the criminal law can directly influence conduct in those instances in which the moral status of the conduct is ambiguous. Thus, it may not be initially obvious that insider trading or computer hacking are condemnable acts, but a criminal prohibition from a morally credible criminal justice system can signal that they are. Of course, neither of these mechanisms can work to give law power to alter conduct unless it has moral credibility with the community it seeks to influence. And it is for this reason that the criminal law gains in crime control effectiveness by heeding the community's shared intuitions of justice, for its dispositions will then reinforce its reputation as a moral authority rather than undercut it. Ultimately, then, the ability of restorative processes to build the criminal law's moral credibility and legitimacy can give the law a greater ability to gain compliance.

Finally, there seems to be little downside to the use of restorative processes. If in some cases there could be an increased danger to victims from an unrepentant offender learning more about the victim, organizers can screen out such cases. The only real risk, then, is that the restorative processes will not work—that they will not give the full payoff that is their potential. But that is no reason not to try them.

II. THE VICIES OF RESTORATIVE JUSTICE

With this enthusiasm for *restorative processes*, how can I be opposed to restorative justice when such processes are its central feature? Answer: Because of what "restorative justice" adds to restorative processes.

It is clear that many advocates of restorative processes use the term "restorative justice" as if it were interchangeable with restorative processes. But the literature by the leaders of the restorative justice movement make clear that they conceive of restorative processes not simply as a potentially useful piece of, or complement to, the criminal justice system, but as a *substitute* for it.⁵ Further, restorative justice ideally would ban all "punishment," by which is meant, apparently, banning all punishment based on just deserts. (The restorative justice advocates concede, as they must, that in practice participants in restorative sessions commonly bring to bear their own intuitions of justice in sorting out an acceptable disposition, but the restorative justice ideal is forgiveness and reintegration, not deserved punishment.) Bowing to what they see as the demands of reality, the restorative justice advocates reluctantly direct the use of deterrence mechanisms if restorative processes fail, and incapacitation mechanisms if deterrence fails.⁶ But giving offenders the punishment they deserve—no more, no less—is rejected as never an appropriate goal.⁷

⁵ See, e.g., John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1746 (1999) (classifying restorative justice as competing with punitive justice).

⁶ *Id.* at 1742.

⁷ Consider the 1998 New Zealand case of Patrick Clotworthy, who inflicted six stab wounds upon an attempted robbery victim, which collapsed a lung and diaphragm and left the victim badly disfigured. See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 23 CRIME & JUST. 1, 87–88 (1999) (discussing Clotworthy); see also *The Queen v. Patrick Clotworthy* [1998], available at <http://www.restorativejustice.org.nz/Judgements%20Page.htm> (providing texts of opinions and

The centrality of this anti-justice view is expressed in the movement's name: restorative justice. The point of the naming exercise is to present restorative processes as if they were a form of doing justice. But, of course, these kind of word games only work so far. Calling something "justice" does not make it so. The term "justice" has an independent meaning and common usage that cannot be so easily cast aside: "reward or penalty as deserved; just deserts."⁸ The naming move can create confusion, and perhaps that is all the leaders of restorative justice want at this point: time to get a foothold in common practice before it becomes too obvious that their restorative justice program is in fact anti-justice. But such word-trickery is not likely to be sufficient for gaining longer-term or wider support. For that, they must face the anti-justice issue squarely and persuade people, if they can, that people ought no longer care about doing justice.

It is this anti-justice agenda that restorative justice adds to restorative processes and that I find objectionable, somewhat odd, and potentially dangerous. (In this Article, I use the term "restorative justice" to include the more ambitious, anti-justice agenda, and the term "restorative processes" to refer to just the processes themselves.)

III. GIVING RESTORATIVE JUSTICE PRIORITY OVER DETERRENCE AND INCAPACITATION

Let me look separately at the two components of restorative justice's proposed program: (1) giving restorative justice priority over deterrence and incapacitation, and (2) barring punishment based on justice.

As to the first, I am highly skeptical of the effectiveness of deterrence as a distributive principle. No doubt having some kind of sanctioning system has some deterrent effect. But the notion that we can construct distributive rules that will optimize deterrence is, I suspect, unrealistic. Offenders simply are not likely to alter their conduct because the law formulates a liability rule one way or another.⁹ In any case,

sentencing notes for case). At a restorative conference organized by Justice Alternatives, the victim agreed to a disposition of a suspended prison sentence, two hundred hours of community work, and a compensation order of \$15,000 to fund his cosmetic surgery. See Braithwaite, *supra*, at 87–88. Justice Thorburn of the Auckland District Court entered the disposition agreed upon at the conference. See *id.* (also noting that Court of Appeal ultimately quashed disposition and entered sentence of four years in prison and \$5,000 compensation).

Requiring the offender to pay the victim \$15,000 for the needed surgery seems entirely appropriate, but such a sanction hardly reflects the extent of the punishment the offender deserves for so vicious an attack. Even if the offender were allowed to stay out of prison long enough to earn the \$15,000, why would it not be appropriate for him to spend his weekends in jail, or to serve a term of imprisonment after the compensation had been earned? Restorative justice proponents like John Braithwaite support the disposition and deny the fact that it was later quashed, noting that the victim subsequently committed suicide for reasons unknown. The suicide is obviously tragic, but it does not alter the fact that the original disposition failed to do justice. Indeed, many would see the restorative conference as a second victimization—a desperate victim must agree to forgo justice in order to rid himself of the disfiguring scar the offender caused. It is a case of an offender benefitting from his own wrongdoing. That restorative justice proponents support such a disposition seems only to confirm their anti-justice orientation.

⁸ WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 766 (2d ed. 1970).

⁹ See PAUL H. ROBINSON & JOHN M. DARLEY, DOES CRIMINAL LAW DETER? A SOCIAL SCIENCE INVESTIGATION 3 (forthcoming 2003); PAUL H. ROBINSON & JOHN M. DARLEY, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. (forthcoming 2003).

deterrence as a distributive principle often produces results that a just society ought not tolerate.

As for incapacitation as a principle for distributing liability and punishment, I concede that it does work. One can prevent offenders from committing most offenses by keeping them in prison. However, as I have argued elsewhere, using the criminal justice system for such preventive detention purposes is bad for both detainees and for society, for such a system is both unfair to detainees—detaining even when there is little preventive justification and confining under inappropriately punitive conditions—and is inefficient and ineffective in protecting society.¹⁰

So I am inclined to let these distributive programs fend for themselves in response to restorative justice claims for superiority. I am happy to have them replaced.

Before moving on, however, I should say I am not sure I understand the restorative justice arguments for why it should take priority over these distributive principles. The restorative justice perspective on deterrence is particularly confusing. The proposal is that restorative justice should be used first, and repeatedly, until it is clear that it cannot work, and only then should the system resort to deterrence. Of course, by turning first to restorative justice, repeatedly, deterrence has already been sacrificed. The signal to potential offenders is that they will be given repeated chances to escape the threatened deterrent sanction. That message cannot be undone when the system finally does "turn to deterrence," upon a failure of restorative justice.

I will let the deterrence advocates press these arguments. My real opposition to restorative justice is based on its conflict with just punishment.

IV. RESTORATIVE JUSTICE VS. JUST PUNISHMENT

First, let me define what I mean by distributing punishment according to justice—for the restorative justice proponents seem inclined to caricature notions of just desert. (I understand the appeal of the move: if one can make the alternative a monster, then restorative justice looks more attractive. But that kind of distortion only tends to signal weakness in one's own theory.) Here is what I mean by doing justice: Giving a wrongdoer punishment according to what he deserves—no more, no less—by taking account of all those factors that we, as a society, think are relevant in assessing personal blameworthiness.¹¹ Justice, then, requires that, in assessing an offender's blameworthiness, we must take account of not only the seriousness of the offense and its consequences but also the offender's own state of mind and mental and emotional capacities, as well as any circumstances of the offense that may suggest justification or excuse. Indeed, a rich desert theory would take account of many facets of what can happen during

¹⁰ See PAUL H. ROBINSON, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1446–47 (2001) (arguing that using criminal justice system for preventive detention is ineffective and unfair).

¹¹ There are two sources of data for determining what is relevant to desert—moral philosophy and empirical studies of a community's shared intuitions of justice—but for present purposes I do not believe that the difference between them is significant. I have written elsewhere about these differences. See PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE* (forthcoming 2004).

restorative processes. Genuine remorse, public acknowledgment of wrongdoing, and sincere apology can all, in my view, reduce an offender's blameworthiness—and, thereby, the amount of punishment deserved.¹²

It is a peculiar view of just desert to see it as "degrading to both its subject and its object,"¹³ as the restorative justice proponents suggest. How many times have we seen on the television news the bereaved family of a victim—ordinary people with good hearts—express their often tearful relief that justice has finally been done. Frankly, I do not know of anyone (other than restorative justice proponents) who would think of the family members as degrading themselves by taking relief in justice being done. That certainly is not the way most societies judge the feeling.

Restorative processes can provide some wonderful benefits, but they can also create serious injustices and failures of justice if used in a way that systematically conflicts with doing justice—where offenders are given more punishment, or less punishment, than their wrongdoing deserves. That does not mean that we must avoid restorative processes. It only means that we must use them in a way that does not conflict with doing justice—something that I will suggest later *can be done* easily for a *full range of cases*.

Let me flesh out this relation between restorative justice and justice by addressing three questions:

- A. Does restorative justice conflict with doing justice?
- B. Why is such conflict objectionable?
- C. Can restorative processes be used in a way that does not conflict with doing justice?

A. DOES RESTORATIVE JUSTICE CONFLICT WITH DOING JUSTICE?

It is more than obvious that restorative justice *can* conflict with doing justice. That does not need much discussion. I can imagine a devoted Jew finding it in her heart to "take the great opportunity for grace to inspire a transformative will"¹⁴ to forgive Dr. Mengele for his ghastly concentration camp experiments on her and her family. But few would think justice was done if that meant Dr. Mengele was free to skip away to a happy life, even if he genuinely apologized to her.

Another obvious problem is the potential disparity in treatment of identical offenders committing identical offenses. Every "sentencing circle" will have a different cast of characters. Having the offender's punishment depend not on his personal blameworthiness but rather on the chance collection of persons at the circle is objectionable in itself, whatever the disposition in the case.

¹² I do not know that retributivists as a group would agree with this; I offer it only as my own view.

¹³ See Braithwaite, *supra* note 5, at 174a.

¹⁴ See Braithwaite, *supra* note 7, at 1–2.

The discussions in this Symposium by David Dolinko and Stephen Garvey provide persuasive illustrations of just how inconsistent restorative justice can be with doing justice.¹⁵

While it seems clear that restorative justice *can* seriously conflict with doing justice, I think I would be more cautious than most in predicting that the use of restorative processes necessarily will conflict. John Darley and I have researched lay intuitions of justice and found a surprising amount of agreement among laypersons, over a wide range of situations and cutting across most demographic variables.¹⁶ Thus, when people in a restorative process session are sorting out what they think is an acceptable disposition, their intuitions are likely to track those of the larger community, especially as the sentencing circle is made larger. No doubt some members will tend to be more harsh in their demands and some more lenient, but typically there will be general agreement as to what factors affect the offender's blameworthiness and how they affect it, and the harsh and the lenient sentencers will average out across the group. Indeed, I might predict that a sentencing circle would be more likely to track the shared intuitions of justice of the community than would a single sentencing judge.

But I remain uneasy about a sentencing circle operating without articulated guidelines, for some of the reasons addressed by Robert Weisberg.¹⁷ Even for the fair-minded person, it is easy to be distracted by the particular characteristics of the offender at hand and hard to stand back and put this case in the larger perspective of other cases. There is too much danger for participants left without articulated guidelines to be influenced, perhaps unconsciously, by things such as how similar or different this offender is from themselves. What would be better than pure ad hoc decision-making would be articulated guidelines that captured the larger community's shared intuitions of the principles of justice, to provide at least a benchmark that could inform the sentencing circle's discussions. (On the other hand, it is also my view, as many of you know from my dissent from the United States Sentencing Commission guidelines, that badly-drafted guidelines can do more harm than good.¹⁸)

My ultimate conclusion, then, is that the use of restorative processes might or might not conflict with doing justice, depending upon how they are structured. That is, one could use restorative processes in a way that would *guarantee* failures of justice, and that is just what true restorative justice proponents appear to want: Specifically, to require disposition by restorative processes where the dispositional options available are inadequate to satisfy the demands of justice. In fact, from what I can tell from the restorative justice literature, it is this justice-frustrating effect of restorative processes that is thought of by its proponents as being one of its most important virtues.

¹⁵ See generally David Dolinko, *Restorative Justice and the Justification of Punishment*, 2003 UTAH L. REV. 319, 331–34 (noting that restorative justice may give similar offenders disparate treatment); Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 306–08 (distinguishing harms from wrongs and arguing that restorative justice repairs harms but ignores wrongs).

¹⁶ See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* *passim* (1995).

¹⁷ Robert Weisberg, *Restorative Justice and the Danger of "Community"*, 2003 UTAH L. REV. 343, 370–71.

¹⁸ See Sentencing Guidelines for United States Courts, *Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission*, 52 Fed. Reg. 18,046, 18,121 (May 13, 1987).

B. WHY IS THE CONFLICT OF RESTORATIVE JUSTICE WITH DOING JUSTICE OBJECTIONABLE?

For those who believe that "doing justice" is a value in itself, the question is rhetorical. Neither the value of doing justice nor the harm of conflicting with justice needs further explanation or independent justification.

For crime control utilitarians, doing justice has traditionally been thought of as suboptimal in reducing crime, or at least as less effective than the mechanisms of deterrence and incapacitation. But crime control utilitarians *ought* to be interested in doing justice (in the sense of having the criminal justice system distribute liability and punishment according to the intuitive principles of justice shared by the community) because, as noted above, social science data suggests that the criminal law can harness the great power of social influence to gain lawabidingness if it can earn a reputation of moral authority and legitimacy with the community.¹⁹ By distributing punishment that conflicts with the demands of doing justice, restorative justice ultimately undercuts the system's crime control effectiveness.

Let me also speak to those persons who care neither about doing justice for its own sake nor about crime control, but rather in something more ethereal such as promoting forgiveness for its own sake. I would advise the devoted Jew in her forgiveness of Dr. Mengele that, despite all the virtues of forgiveness that have been expressed by advocates for restorative processes, there is more at stake in how we deal with Dr. Mengele than just this victim's forgiveness.

First, the harm of most criminal offenses spreads to persons beyond the immediate "official victim." Many Jews not part of Dr. Mengele's experiments may nonetheless feel victimized by him. Indeed, criminal law is unique in embodying norms against violation of societal, rather than personal, interests. All crimes have society as their victim, not merely a single person. Further, not all victims may be as forgiving as the one at hand. Are the feelings of many to be overlooked because of the forgiveness of a few? Are the societal norms that protect us all to be undercut because of the forgiveness of the victim at hand?

Second, many people believe that forgiveness is appropriate only after a wrongdoer accepts full responsibility for his wrongdoing and fully atones for it. Being remorseful, by itself, is not full atonement. Atonement is not achieved simply by making restitution, but may require suffering beyond restitution, a suffering the acceptance of which will show the person's acceptance of the wrongfulness of his actions. Indeed, the offender who does not expect and accept his just punishment may be seen as one who does not understand or accept the wrongfulness of his conduct.²⁰

¹⁹ See TOM TYLER, *WHY PEOPLE OBEY THE LAW* 108 (1990); Robinson & Darley, *supra* note 4, at 471-77. This represents a different kind of "hybrid" distributive principle from that which Erik Luna has discussed. See Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 225-27. Here there are no trade-offs between utility and doing justice. Rather, the greatest utility is found in a justice distribution of liability and punishment, or at least in a distribution according to a community's shared intuitions of justice.

²⁰ In fact, genuinely remorseful offenders will think their just punishment is less than that actually deserved, for this reason: The offenders' genuine remorse reduces their blameworthiness for the offense, yet offenders cannot expect or insist that their remorse reduce their punishment, any more than they

Finally, it is not entirely clear to me that the *personal* virtue of forgiveness can be an effective operating principle for a society. One can admire and encourage forgiveness, and believe that it is a personal virtue that ought to guide people in their daily lives, yet also conclude that those who have the responsibility to build a better society—where victims as well as wrongdoers can live fruitful lives—must leave forgiveness to the realm of personal virtue.

C. CAN RESTORATIVE PROCESSES BE USED IN A WAY THAT DOES NOT CONFLICT WITH JUSTICE?

The short answer is yes. Where restorative processes are used to complement the criminal justice process rather than to replace it, such processes have little justice-distorting opportunity. There seems every reason to embrace their use.

Can restorative processes ever be used as a *substitute* for the traditional criminal justice adjudication in a way that is consistent with doing justice? In many kinds of cases it can. The most serious limiting factor is the restriction commonly placed on the kinds of dispositions restorative processes are authorized to make.

Given the present limitations, restorative processes seem consistent with doing justice in at least four kinds of cases:

1. *Crimes by juveniles.* Even for serious offenses, juvenile offenders are likely to have significantly reduced blameworthiness due to their limited maturity. That is, (a) they may not fully appreciate the consequences of the harm they cause, (b) they may not have had an opportunity to fully appreciate the societal norm they have violated, and (c) they may be too young for us to expect them to have developed the impulse control that we would expect of an adult in responding to difficult situations or temptations or provocative conduct.²¹
2. *Minor offenses by adults.* Minor offenses will call for deserved punishment levels sufficiently low that they may be satisfied by the dispositions that are typically within the authority of restorative processes.
3. *Serious offenses by adults for which there are significant mitigations.* If strong arguments for justification or excuse exist, the ultimate level of punishment deserved may be within the range of the sanctions available in restorative processes.
4. *Offenses by nonhuman legal entities.* Entities, such as corporations, are not moral beings for whom the notion of justice has meaning. (In fact, in my

can expect or insist on forgiveness. To insist on a mitigation for remorse is to undercut the sincerity of the remorse itself. Thus, the punishment discount for remorse will always be a pleasant surprise to the genuinely remorseful offender.

²¹ See Kim Taylor-Thompson, *States of Mind/States of Development* 20-24 (Nov. 19, 2002) (unpublished manuscript, on file with author).

view, to use the criminal justice system to "convict" and "punish" such legal fictions risks obscuring the moral content of criminal liability. Better that such entities are dealt with through methods outside of the criminal justice process.²²

What is most interesting about these four categories of cases in which restorative processes avoid conflict with justice is that, as far as I can tell, all of the dispositional authority that has been granted to restorative processes to date falls into one of these four categories. Examples of some well-known programs are as follows:

New South Wales and New Zealand: Restorative processes are used for disposition of juvenile offenders.²³

Vermont: Restorative processes operate as a condition of probation, and therefore are subject to all of the limitations as to what offenses can be given a sentence of probation and are subject to screening by the sentencing judge.²⁴

Delaware: Restorative processes are available only upon the prosecutor's approval, as with traditional pretrial diversion programs; presumably prosecutors screen cases according to whether a restorative process disposition can do justice.²⁵

Minnesota: Restorative processes are used informally, running in parallel to the criminal justice process, rather than as a substitute for it.²⁶

In these jurisdictions I found no instance in which the existing statutes limited either: (a) a prosecutor's traditional ability to charge and prosecute offenses to insure that justice is done, or (b) a court's traditional ability to impose a deserved sentence.

This is good news in judging the attractiveness and potential acceptability of current restorative processes. But it seems inconsistent with the claims of restorative justice proponents that their program is "a global social movement" with some good momentum.²⁷ If the primary contribution that restorative justice makes beyond the virtues of simple restorative processes is to discard concerns about doing justice, one would think that with all its "great success" one could find at least a few programs in which it was achieving its anti-justice mission.

This also means that the label "restorative justice" is misleading when used to describe our present practices. The current use of restorative processes appears to be deliberately limited to cases where the available sanctions are enough to do justice; that is, the current system is careful to preserve its ability to do justice. What exists today, then, is not the anti-justice "restorative justice" but rather the simple use of restorative processes.

²² Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U.L. REV. 201, 211 n.40 (1996) (noting that, unlike people, legal fictions neither feel nor deserve moral condemnation).

²³ See Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 240, 273-76 (2000) (discussing programs in New South Wales and New Zealand).

²⁴ See Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 65-68 (discussing Vermont's reparative boards program).

²⁵ See DEL. CODE ANN. tit. 11, §§ 9501-9505 (2001) (setting forth Delaware's victim-offender mediation program).

²⁶ See Univ. of Minn., School of Social Work, Center for Restorative Justice & Peacemaking, available at <http://ssw.che.umn.edu/rjp/> (last updated Feb. 7, 2003) (discussing various programs in Minnesota).

²⁷ Braithwaite, *supra* note 5, at 1728, 1743.

V. CAN PRESENT RESTORATIVE PROCESSES BE EXPANDED TO INCLUDE A FULL RANGE OF CASES WHILE REMAINING TRUE TO JUSTICE?

Can the use of restorative processes be expanded to serious offenses and remain consistent with desert? This is a particularly important question because, according to the empirical results Heather Strang and Lawrence Sherman report, it may be that restorative processes have their greatest benefit in the most serious cases.²⁸

I believe such expansion is possible in a way that is consistent with justice. How can this be done? First, as is obvious from the previous discussion, if the seriousness of the authorized dispositions by restorative processes are increased, the kinds of cases dealt with could be widened. Some people will be hesitant to give serious sentencing authority, such as imprisonment, to a restorative process body, no matter what an offender's veto power. But one can conceive of versions of restorative processes that include judicial participation and/or include guidelines that structure discretion.

A second point may be the most important for expanding restorative processes. Consider for a moment the demands of justice: justice cares about *amount*, not *method* of punishment. Thus, one could impose deserved punishment through any variety of alternative methods without undercutting justice—fine, community service, house arrest, curfew, regular reporting, diary keeping, and so on—as long as the total punitive "bite" (the "punishment units") of the disposition satisfies the total punishment the offender deserves, no more, no less.²⁹

This characteristic of justice has two important implications for restorative processes. First, because all forms of sanction can give rise to "punishment credit," good-faith participation in restorative processes can count toward satisfying the required punishment, at least to the extent of the personal suffering that it produces. No doubt there is discomfort in attending a meeting where family and friends have gathered to discuss one's wrongdoing. Second, restorative processes may provide an effective means for sorting out just how the total punishment units called for are best "spent"—i.e., restorative processes may be a particularly effective means of fashioning a disposition from among the wide variety of available methods, that will best advance the interests of restoring the victim, the offender, and society.

Finally, as has been noted above, the problem of limitations on the dispositional authority of restorative processes is relevant only in instances where such restorative processes are used as the dispositional process—that is, where it is substituting for the criminal justice system or becoming the dispositional mechanism for that system. This is equally true when restorative processes are used for serious offenses. Where such processes are only complementary to the criminal justice system—where they operate parallel to criminal justice—there is no reason for any limitation on their use, for there is no

²⁸ See Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 40.

²⁹ I have written about such a proposal. Paul H. Robinson, *Desert, Crime Control, Disparity, and Units of Punishment*, in *PENAL THEORY AND PRACTICE: TRADITION AND INNOVATION IN CRIMINAL JUSTICE* 93, 99-104 (Anthony Duff et al. eds., 1994).

danger that justice will be undercut. (One might worry that if restorative processes were an entirely complimentary rather than a substitute system, offenders might have little motivation to participate. But one could have the criminal justice system look to and take account of the restorative processes disposition in setting the criminal justice sentence.)

VI. CONCLUSION

Ultimately, my reaction to restorative justice—the theory of restorative justice, not the practice of restorative processes—is one of puzzlement, for this reason: What makes restorative processes work is the emotional need of the participants—a victim's or participant's sense of satisfaction or release in justice being done or, on occasion, an offender's sense of atonement from a just result. Yet it is this same emotional need—inherent in human nature—that restorative justice is so quick to reject outside of the restorative process.

Imagine the people who have attended a sentencing circle one day, who the next day read in their morning newspaper a story of a twenty-two year old who runs on foot from police when police spot him in a car he has failed to return to its owner. During the police chase, an officer on foot is killed by an officer driving a patrol car. The offender is convicted of murder under the felony-murder rule and sentenced to forty years imprisonment.³⁰ The readers are likely to be offended by this result; it violates their collective notions of what the offender deserves. (Empirical studies confirm that people typically see such cases of accidental killings in the course of a felony as tantamount to manslaughter at most, not murder.³¹ Indeed, in this case it is not even clear that people would see the offender in such a case as having much, if any, causal accountability for the death.³²) Yet this is apparently irrelevant to the restorative justice proponents. If the restorative process does not work—assume the dead police officer's family is of a very unforgiving sort—the restorative justice proponents would defer to deterrence, and the felony-murder rule makes good sense under a deterrence theory; deterrence is the primary basis on which it is justified. Why wouldn't the restorative justice proponents, sensitive as they are to the importance of people's feelings about justice, enthusiastically support attempts to track shared community intuitions of justice as the criminal justice system's distributive principle? How can the feelings of those at the sentencing circle be so legitimate and so central the day before, but now so irrelevant?

Or imagine that our sentencing circle members the next morning read the story of an unrepentant Nazi concentration camp officer who, it is decided, will not be prosecuted because he is now elderly and no longer a danger—classic incapacitation analysis. Our sentencing circle people are offended: They see a failure of justice in this disposition. Yesterday their collective views were central, but today their views are

³⁰ This is the *McCarty* case from South Chicago. See PAUL H. ROBINSON, *CRIMINAL LAW CASE STUDIES* 1-5 (2d ed. 2002); PAUL H. ROBINSON, *TEACHER'S MANUAL FOR CRIMINAL LAW CASE STUDIES* 13-14 (2d ed. 2002).

³¹ See ROBINSON & DARLEY, *supra* note 16, at 169-81.

³² See *id.* at 181-89.

irrelevant, something the criminal justice system should ignore? Restorative justice tells us to follow the principle of incapacitation, which lets the Nazi officer go free because there is no danger of future crime to be avoided by his incarceration, rather than to look to doing justice.

To summarize my proposal, it is this: Use restorative processes as much as possible, as either complementary to the criminal justice system or as a dispositional process within it. Where restorative processes are used as the dispositional process, the sanctioning options made available ought to be sufficiently serious to allow justice to be done. This can be done either by limiting the use of restorative processes to cases where deserved punishment is not great—as is typically done today—or by increasing the punishment available to restorative processes. In the latter case in particular, articulated guidelines are desirable, as would be a "punishment units" system that allows the restorative processes greater unfettered discretion in determining the method of punishment than in determining its amount.