

## **Pile It On: More Texts on RJ**

Elmar Weitekamp and Hans-Jurgen Kerner (eds.)

*Restorative Justice: Theoretical Foundations*

Cullompton: Willan Publishing 2002. 350pp. £27.50/\$39.95 (pbk). ISBN 1-903240-83-2

Lode Walgrave (ed.)

*Restorative Justice and the Law*

Cullompton: Willan Publishing 2002. 248pp. £26/\$34.94 (pbk). ISBN 1-903240-96-4

Carolyn Hoyle and Richard Young (eds.)

*New Visions of Crime Victims*

Oxford: Hart Publishing 2002. 243pp. £26 (hbk). ISBN 1-84113-280-2

Declan Roche

*Accountability in Restorative Justice*

Oxford: Oxford University Press (Clarendon Studies in Criminology), 2003. 316pp.  
£50 (hbk). ISBN 0-19-925935-6

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Twenty years from now, how will we judge this moment in the history of criminal justice? High incarceration rates sit alongside new ways of thinking about justice that *promise* to be different and give *hope*. Such contrary trends exist not only in domestic (or state-level) justice, but also between it and international criminal justice (O'Malley 1999; Roberts 2003).

Restorative justice (RJ) encapsulates promise and hope, although it is defined in the literature in other ways. As everyone says, the term resists easy and agreed-upon definition. Broadly it promises to 'hold offenders accountable' for crime in ways that are constructive, but not punitive or harsh; it promises to include the voice and experience of crime victims; it promises to be dialogic and participatory, with an emphasis on communication between offenders, victims and their supporters, and with less attention to legal relevances or the voices of legal actors. RJ is used at all stages of the criminal justice process and in all institutions of

criminal justice (police, courts, corrections); it is used in non-criminal decision-making contexts such as child protection and school discipline; it is sometimes associated with the resolution of broad political conflict (such as South Africa's Truth and Reconciliation Commission). It is often conflated, wrongly in my view, with Indigenous justice practices such as Navajo peacemaking courts. One of the field's leading scholars and advocates, John Braithwaite, has even grander ambitions for RJ: he sees it as a way to reconceptualize international diplomacy and sustainable economic development (Braithwaite 2002).

What started out in North America and the UK in the 1970s as a way for individual offenders and victims to meet each other has morphed into a *global justice metaphor* for a kinder, gentler, more reasonable, hopeful, and negotiated justice: a 'good' justice. RJ proponents often set it apart from the 'bad' justice of established criminal justice practices, which for convenience are termed 'retributive justice'. For some time, I have argued against characterising restorative and retributive justice in dichotomous, oppositional terms. Anyone familiar with current and past criminal justice practices knows the dichotomy is misleading. It remains popular, however, because it simplifies a highly complex justice field and helps to sell a new justice idea. Looking back in 2024, will we see the current fascination with RJ as a short-term fad that stayed at the margins or as a turning point in the history of justice? Will we see it as a failed experiment or as the start of a great transformation?

The contemporary moment is extraordinary if we examine the published texts on RJ. In the past 10 years (1994-2003), over 60 edited collections or book-length treatments on RJ, written in English, have been published.[1] Many more are appearing in 2004. Have we become 'gluttons for restorative justice' (Roche 2003: 630)? No other justice practice has commanded so much scholarly attention in such a short period of time. I will not try to explain why the idea has captivated so many people across the world – researchers, policy makers, activists and advocates, and governments – and so rapidly (but see Bottoms 2003 for an excellent start). An important question for the sociology of knowledge is to ask not only what conditions have facilitated its popularity, but also why so many feel compelled to say something about it.

Of the four books under review, one (Hoyle and Young's *New Visions of Crime Victims*) does not centre on RJ, but on victims, although it has several essays on RJ. Two are edited collections from International Conferences on Restorative Justice for Juveniles: one held in Tuebingen in 2000 (Weitekamp and Kerner, *Restorative Justice: Theoretical Foundations*) (hereinafter W & K)[2] and another, in Leuven, in 2001 (Walgrave, *Restorative Justice and the Law*). Of the four books under review, Roche's *Accountability in Restorative Justice* is the sole book-length treatment of RJ; the text arises from his PhD research.

## Recurring themes and debate

The conference-edited collections contain a total of 26 chapters, with author overlap across the two volumes (Pavlich, van Ness, and Walgrave appear in both). It is not possible to give individual attention to the many arguments and views, so I'll be schematic and comparative.

Expectedly, there are distinctive starting points for each author. These turn on what part of the world the author is writing from (e.g., a common or civil law country), whether the writer is an advocate or sceptic (or neither), and whether the writer is interested in social theory or in developing 'best practice'. Among the major sources of debate today are the uses of the term 'community' in restorative justice rhetoric, where US writers use the term frequently and glowingly, whereas European and UK writers are more critical (Walgrave in W & K; Crawford in Walgrave); and the meaning and place of 'punishment' and 'retribution' in a restorative process. Some find the terms and their associated values objectionable (Walgrave, Fattah, and Weitekamp, in W & K; Braithwaite and Walgrave in Walgrave), and others see them as elements in any criminal justice practice (Mackay and Zehr [who has shifted his position] in W & K; Duff and Dignan in Walgrave).

The term 'retribution' and the relationship between retributive and restorative justice continue to haunt scholars' thinking and analyses. Braithwaite makes the argument, which he has been making since he critiqued von Hirsch and just deserts nearly 15 years ago, that proportional and consistent justice 'will almost always be the wrong solution to the problem'. Contextual justice and 'responsive regulation' are preferred (Braithwaite in Walgrave, p. 158). Other RJ advocates want to see some proportionality in RJ penalties.

I am drawn to arguments that attempt to relate retribution to restoration, as Duff does (in Walgrave), or that relate 'restorative justice approaches and the conventional criminal justice system' as Dignan does (in Walgrave, p. 170). I am also drawn to arguments such as Mackay's (in W & K), which suggests that 'the powerful dynamics represented by punishment, guilt and spirit' must feature in modern day restorative processes (p. 248) because crime evokes 'powerful emotions of horror, revulsion, grief, anger, and resignation' (p. 264). Duff reminds us that crime is not just a 'harm'; rather, crime is a harm and a *wrong* (p. 88), a point that many RJ advocates, and others more generally, may not sufficiently grasp.

I am less drawn to arguments such as those by van Ness (W & K and Walgrave), which schematise justice as words in boxes with arrows going in many directions. I disagree with McCold and Watchel's operationalisation of 'restorativeness' as victim or offender 'satisfaction' with the process, or rating it as being fair or not. These are not measures of 'restorativeness' but rather of procedural justice. However, the Venn diagram of the 'types and degrees of restorative

justice practice' (McCold and Watchel, in W & K, p. 116) remains an important contribution to the literature.

In general, the US writers on RJ seem to be marching to a different drummer than those in other countries. In addition to an emphasis on 'community', they tend to be more enthusiastic, cheering on anything that looks remotely more progressive in a country that is, on average, tougher on crime than any other in the western world. This occurs for the reasons given in Schiff and Bazemore's survey (in W & K) of US 'juvenile restorative conferencing programs' (which are largely composed of 'victim-offender mediation and dialogue' and 'neighbourhood boards and panels', p. 182). They find that while there are many programs, they 'typically have relatively small budgets and make extensive use of volunteers' (p. 196). State variation is substantial: some state's activities are 'small [and] ad hoc' whereas others have more established links between state and private agencies. Legislation establishing and funding restorative justice initiatives, of the sort that exists in Australia and New Zealand, and to a lesser degree, in England and Wales with the Youth Offender Panels, is absent in the US.

### **Of butterflies and swords**

Of all the authors in the two collections, Crawford (in Walgrave) wins the prize for most intriguing title, 'The state, community and restorative justice: heresy, nostalgia, and butterfly collecting'. There is more to applaud than the title. Crawford points out that 'like butterfly collecting, there is a tendency in the ... literature to extract examples (drawn from around the world or across time) which are abstracted and removed from the cultural and social environment which sustains them' (p. 111). RJ collectors seek "'pretty" or "exotic" [examples] that ... illustrate the case for restorative justice, rather than engage with the less attractive aspects of social arrangement and human relations' (p. 111). An important implication that Crawford draws is that 'participants in international meetings or collections of essays often speak and write about restorative justice initiatives as if they, like the butterflies in the glass-cased collection, were easily understood abstracted from the habitat which nourishes them'. We may all think we are talking about the same thing called RJ, but in fact, we are referring to multiple expressions and practices as RJ articulates with culture and 'legal and political institutions and social practices' (p. 112).

I am critical and impatient with those who say that modern day restorative justice reflects a reversion to ancient forms of justice, including Indigenous justice practices, a view exemplified by Weitekamp (in W & K, p. 325): 'It is somewhat ironic that, at the beginning of the new

millennium, we have to go back to methods and forms of conflict resolution which were practised some millennia ago by our ancestors'. As Mackay (in W & K, p. 264) reminds us, 'where restorative justice practices were operative in ... traditional societies, these included elements ... redolent of a stern and bloodier worldview'. By selectively drawing on a Eurocentric view of 'the past,' ignoring the blood and sacrifice, identifying only the 'exotic' butterflies, and making history serve their own ends and arguments, some RJ commentators have a lot to answer for. I concur with Cunneen (in W & K, p. 46), who says that 'many of the "links" drawn between RJ and indigenous mechanisms of social control rely on a parody of the complexities of indigenous cultures, a parody that demeans people's cultures and historical experiences ...' While some Indigenous authors have drawn links between Indigenous forms of social control and RJ, non-Indigenous authors should be careful not to colonise a variety of old and new Indigenous justice practices by calling them RJ.

There is a decided skew in the literature on RJ in that few commentators utilise or bring to bear arguments from social theory. Pavlich (in W & K and Walgrave), Cunneen (in W & K), and Mannozi (in W & K) are unusual in this regard. Using Derrida, Pavlich continues to work with the idea of justice as promise. 'Its promise is infinite – it never arrives. Its power lies in the enticing lure variously held out through the promises of what might be, what might become' (p. 13). Cunneen lifts the theoretical and political discussion by arguing for more linkages to be drawn between RJ, decolonialisation, and globalisation. Mannozi starts off intriguingly by raising questions about the iconography representing 'Justice as a female figure, at times blindfolded, holding scales in her left hand and a sword in her right' (p. 224). Together these elements form a 'perfect allegory,' but Mannozi asks, how might it relate to 'penal mediation' (her term for RJ). For example, 'is every dispute amenable to settlement' or 'are some controversies ... intractable?' (p. 228). Or, as she asks later, does 'Justice ... need the sword ... to "punish" or "sever"?' (p. 243). Unfortunately, she elides the question by introducing another image of justice, from a 16<sup>th</sup> century painting, which has an olive branch and a blunted sword. She proposes (rhetorically) that we imagine justice without a sword, but 'as an instrument for social peace, reached through mediation' (p. 243). A nice thought, but I wondered why the sword went missing.

Mannozi's discussion of the feminine form as the embodiment of justice is of interest. Drawing from Edgerton (1980: 32), she suggests it represents justice as 'mediation between divine, absolute ... law and the fallible conduct of man [sic?] on Earth' (p. 224). Apart from this reference and Cunneen's article, there was no discussion of gender, or feminist challenges to RJ, especially in the response to domestic or sexualised violence, in either conference collection. All

the essays, but one, in the Walgrave volume were authored by men (the one exception had a female second author). Race and post-colonial relations also had a minimal presence.

### **Formal-informal justice and participants' subjectivities**

Two areas will continue to feature in the RJ literature in the years ahead. One is the relationship between formal and informal justice, the focus of Roche's book and some contributors to Walgrave's collection. This is a well grooved area (since Rick Abel's edited volumes in the early 1980s), and appropriately so, because it invites analysis of how RJ, as a set of new justice norms and practices, can or will relate to formal legality, or how it might change formal legality (as proposed by Dignan in Walgrave). One can take a theoretical or abstract modelling approach to the question (as Walgrave and other contributors to his volume do) or one can view the question in empirical and socio-legal terms, as Roche does.

A second area, which receives less analytical notice, is participants' subjectivities in the criminal process. Alongside the instrumental deterrence question, does it work?, is posed a most unusual question (however ubiquitous in the literature): are participants satisfied? Consider: when has the state (or researchers) ever cared if victims or offenders are 'satisfied' with their experiences in a legal process? What is the significance of this question, and why is it being asked now? One answer is that the feminist and crime victims' movements in the 1960s and 70s spotlighted the failures of the criminal process to address 'the victim'. This initial concern with crime victims' experiences in the criminal process has widened in the RJ literature to include offenders and an amorphous 'community'. I look forward to reading a more critical and probing analysis of participants' subjectivities in the legal process. *I Can't Get No* would be an apt title.

Hoyle and Young's collection centres on 'neglected aspects of crime victimisation' (p. v), including male victims of rape, female-on-male domestic violence, victims who do not attend police formal cautions, and organisational victims in RJ processes. It contains excellent analytical review essays by Rock and Sanders, respectively, on the 'victim' category in legal and criminological thought, and the current and future participation of victims in the criminal process. Although some authors touch on RJ, two give it prominence.

Hoyle asks why only 14 percent of victims attended youth justice 'restorative sessions' (these are termed conferences when victims are present and cautions when they are absent, p. 103), which were run by the Thames Valley Police for over three years. The main reasons victims gave for not attending were that they didn't want to meet the offender face to face, they feared re-victimisation by the offender, they weren't fully aware of what the process was, and

they believed the offender would only get ‘a slap on the wrist’. Hoyle argues that victims who do not attend could benefit by indirect participation, for example, by providing statements or information at the caution and receiving feedback from the facilitator on what happened. Here she finds that the facilitators may not be effective in communicating what the victim wants at the meeting, nor in describing what occurred later. Ultimately, while recognising the ‘obstructive realities’ (p. 129) of achieving the ideas of RJ, Hoyle argues that victims should be brought more into the cautioning process and could receive its benefits if facilitators distinguished those victims who did not want to participate in any way from those who wished to participate, but indirectly. While I would like to be optimistic, I am less sanguine than Hoyle that the problems she saw in facilitators’ practices, especially those related to organisational routines, can be overcome by ‘improved training in effective communication’ of facilitators (pp. 129-30).

Young argues that too little attention has been given to organisational victims in the RJ process. He calls attention to the paradoxical nature of some commercial organisations’ actions, such as banning young people from their store, when the store’s longer-term interest should be to have offenders back as paying customers. He notes that while social exclusion of offenders was prominent in some Thames Valley Police restorative sessions, there were signs of hope in others. Compared to Young, I am less enthusiastic about using state-run youth justice conferences for shoplifting. These cases typically have ‘repeat player victims’, ‘routinised victim impact lectures’ (p. 165), and trivial offending. Perhaps stores could introduce restorative processes as part of their own internal procedures? What is compelling about the chapter is the power of the transcript, and more generally, the strength of this research project (with Hoyle), which tape-recorded 90 restorative sessions. Thus, Young demonstrates convincingly what he means by an ‘exclusionary logic’ when a store detective berates an offender for coming into the store after having been banned (pp. 157-59). The detective says, ‘You’re banned ... You’re a thief? Yes?’ to which the offender says ‘No, I *was* a thief .... I *was* ... I’m not no more’. The exchange goes on for several pages, showing what can ‘go wrong’ in a conference.

### **Accountability beyond boxes, arrows and bubbles**

Roche is interested precisely in the problem of what goes wrong in informal justice. In this highly original and important contribution to the RJ literature, Roche points out that ‘for all its promise of promoting healing and harmony, RJ can deliver a justice as cruel and vengeful as any’ (p. 1). He is concerned with addressing the many risks of informal justice, while being able to take advantage of the benefits. Roche aims to ‘describe and develop that system in which

participants in meetings are deliberatively accountable to one another and where the state plays a key role in assisting—rather than hindering—citizens’ deliberations’ (p. x). Standard and non-standard forms of accountability are discussed, with examples drawn from Roche’s 25 case studies of RJ programs in Australia, England, New Zealand, South Africa, the United States, and Canada. It is the non-standard, informal forms of accountability, largely overlooked by others, which interest Roche the most. He brings to life many types and sources of ‘inbuilt’ deliberative accountability (p. 121) that can arise in a restorative process from his case studies. He shows what happened and what could happen to improve accountability.

Roche challenges Braithwaite and Parker’s (1999) claim that informal justice will ‘bubble up’ and change formal legality. He argues instead that ‘the real instrument of change of formal law is formal law itself ... [because] the law works as a self-referential system of communication ...’ (p. 214). His analysis of external (court or appellate) reviews of RJ penalties finds that when the appeal is allowed, a typical outcome is an increase in penalty. This leads him to suggest that a judicial review ought to focus on the ‘quality of the deliberative negotiations’ (p. 217), not the penalty. He proposes other review mechanisms, including legislation that ‘sets out broad standards for judges to use to assess restorative agreements’ (p. 225); and he outlines methods of making restorative meetings more open to the public.

On many occasions, he emphasises the inappropriateness of police-run (or judge-run) meetings or those held in police stations. He stresses the importance of ‘neutral convenors and venues’ (p. 138). This is an important point, especially when considering the development of police-run schemes in the US and England. I would be curious to know how or if his arguments are being taken up by those in police organisations.

Roche’s book will awaken legal practitioners, especially judges, to the potential of restorative processes. In depicting the specific ways in which informal deliberative processes can articulate with formal legality, he gives readers clear images and examples of what occurs. He admits that ‘current practice departs from the ideal sketched here’ (p. 239) and that ‘in many cases, meetings do not provide ... deliberative accountability’ (p. 229). Compared to other texts on RJ, this one is exceptional: it offers readers a concrete and dynamic view of RJ’s promise and risks, a reflective and synthetic discussion of the importance of trust and accountability in criminal justice institutions, and an engagement with formal legality and state justice that goes well beyond words in boxes and bubbles from below.



## Notes

1. This is a conservative estimate. It includes books where RJ, restorative, or restoration is in the title (or, at times, relational and transformative), as well as some books whose content is on RJ but the word is not in the title; it excludes all reports, booklets, and pamphlets. It includes RJ in local and international contexts, and edited volumes only when the whole text is on RJ. My research assistant scanned reference lists in other publications, visited and conducted searches at major bookstore and RJ websites; and checked the major publishers' websites. A copy of the list and how it was generated can be obtained at my website address: [www.griffith.edu.au/school/ccj/kdaly.html](http://www.griffith.edu.au/school/ccj/kdaly.html). For further information or if you wish to suggest books to add, email Brigitte Bouhours (b.bouhours@griffith.edu.au).
2. This volume of is one of two published from the conference. The other is Weitekamp and Kerner (eds.) *Restorative Justice in Context: International Practice and Directions* (2002), Willan Publishing.

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